No. 06-10605

In the

Supreme Court of the United States

CHRISTOPHER BARBOUR, *et al.*,
Petitioners,

v.

RICHARD ALLEN, Commissioner, Alabama Department of Corrections, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record

J. Clayton Crenshaw
Assistant Attorney General

State of Alabama
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130
(334) 353-9782

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QUESTIONS PRESENTED

Where the petition neither alleges any split of authority nor raises any question of national importance but seeks, at most, only simple error-correction, and where the record shows that Alabama death-row inmates are almost uniformly assisted by qualified counsel in preparing and presenting post-conviction challenges to their convictions and/or sentences, is there any basis for reversing the district court's and Eleventh Circuit's determinations –

1. that on this record these petitioners have no constitutional right to the assistance of taxpayer-funded post-conviction counsel as such;

2. that on this record these petitioners have no constitutional right to the assistance of taxpayer-funded post-conviction counsel as the sole means of ensuring access to the courts; and

3. that on this record these petitioners have no constitutional right to an unspecified "lesser form" form of post-conviction assistance as a means of ensuring access to the courts?

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INTRODUCTION

The petition in this case, with all respect, is a work of fiction. Petitioners ignore the binding law that is squarely against them, and then spin a fantastic tale – of scores of helpless death-row inmates wandering blindly, and alone, through a hopelessly complex procedural minefield – that has absolutely no foundation in the evidentiary record or, for that matter, in reality writ large. The case the petition describes may be interesting, and, indeed, it may seem troubling. *But it is not this case*. Certiorari should be denied.

STATEMENT OF THE CASE

A. Proceedings Below

1. ***The District Court.*** On December 28, 2001, petitioners, on behalf of Alabama death-row inmates, filed this class action under 42 U.S.C. §1983. In their complaint, petitioners asserted, first, that Alabama does not "assist condemned inmates to obtain any sort of aid from counsel in preparing and presenting postconviction claims" (Doc. 1, ¶1; *see also id.* ¶¶27-35); and, second, that inmates who have counsel "find their access to their attorneys severely curtailed by the arbitrary and unreasonable visitation policies" at Alabama's death-row prisons (*id.* ¶2; *see also id.* ¶¶36-136). Petitioners alleged that, taken together, these acts violate the "right[] of meaningful access to the courts in violation of the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." *Id.* ¶3.

In a preliminary order, the district court dismissed any portion of petitioners' complaint that might be read to allege a freestanding Sixth Amendment right to post-conviction counsel, holding that "the law is well settled that there is no constitutional right to state-appointed counsel in post-conviction proceedings." Pet. App. A-21. The district court later dismissed, pursuant to settlement, petitioners' claim that the prisons' visitation policies impermissibly curtailed

represented inmates' ability to meet with their lawyers. Doc. 102.

That dismissal set the stage for the current appeal. It left, as the district court observed, "what is in essence a single claim" – namely, that the State's failure "to provide counsel or some other form of adequate legal assistance to death row inmates prior to filing in state court their postconviction challenges to their convictions and sentences of death deprives them of their constitutional right of access to the courts." Pet. App. A-45. With regard to that sole remaining issue, the district court accepted briefs (and reams of evidentiary material) and certified a plaintiff class, *see* Pet. App. A-30. Then, on January 23, 2006, the district court issued an opinion rejecting petitioners' claim and entered final judgment in the State's favor.

In its opinion, the district court exhaustively traced the "[e]volution" of constitutional access-to-courts jurisprudence. Pet. App. A-48. Relying on this Court's decisions in *Ross v. Moffitt*, 417 U.S. 600 (1974), *Bounds v. Smith*, 430 U.S. 817 (1977), *Pennsylvania v. Finley*, 481 U.S. 551 (1987), *Murray v. Giarratano*, 492 U.S. 1 (1989), and *Coleman v. Thompson*, 501 U.S. 722 (1991), as well as the Eleventh Circuit's decisions in *Hooks v. Wainwright*, 775 F.2d 1433 (11th Cir. 1985), and *Hill v. Jones*, 81 F.3d 1015 (11th Cir. 1996), the district court held that "the right of meaningful access does not require the State of Alabama to provide counsel to death row prisoners for the purpose of investigating and the filing of postconviction proceedings." Pet. App. A-57. Petitioners' argument, the court observed, "would effectively nullify the Supreme Court's holding in *Coleman v. Thompson*, 501 U.S. 722 (1991), that '*Finley* and *Giarratano* established that there is no right to counsel in state collateral proceedings.'" Pet. App. A-56-57.

The district court also emphasized (Pet. App. A-52-53) that petitioners had failed to demonstrate prejudice (or standing) as required under this Court's precedent: first, by showing that the State's failure to appoint post-conviction counsel had actually hindered their ability to

pursue legal claims, *see Lewis v. Casey*, 518 U.S. 343 (1996); and second, by identifying in their complaint any colorable underlying claims that they would have pursued but for the non-provision of counsel, *see Christopher v. Harbury*, 536 U.S. 403 (2002).

Finally, the district court reiterated its earlier holding that the Sixth Amendment does not entail a freestanding right to post-conviction counsel as such (Pet. App. A-53) and briefly rejected any contention that "if the appointment of counsel is not constitutionally required, the state must provide some [other] form of legal assistance" (Pet. App. A-57-58).

2. *The Eleventh Circuit.* The Eleventh Circuit (Dubina, J., joined by Anderson and Vinson, JJ.) unanimously affirmed the district court's decision. As an initial matter, the court of appeals disagreed (in part) with the district court's standing determination. Specifically, the Eleventh Circuit concluded, first, that petitioners had adequately alleged "actual injury" and causation within the meaning of *Lewis*; and, second, that although it was "questionable whether the inmates provided sufficient detail to determine whether their underlying claims are 'arguable' or 'nonfrivolous'" as required under *Harbury*, the complaint was clear enough to permit "consider[ation of] the merits of the inmates' access claims." Pet. App. A-5.

With respect to the merits of petitioners' contention that they are entitled to taxpayer-funded post-conviction counsel as an adjunct to the right of access, the Eleventh Circuit looked first to binding circuit precedent. "As in the present case," the plaintiffs in *Hooks v. Wainwright*, 775 F.2d 1433, had "relied upon *Bounds* [*v. Smith*, 430 U.S. 817,] in support of their position that Florida prisoners were entitled to state-provided counsel for the filing of collateral suits." Pet. App. A-6. "After a careful review of *Bounds*," the *Hooks* court had "held that requiring a state to provide counsel to prisoners for the filing of collateral suits was squarely contrary to *Bounds*." *Id.* The Eleventh Circuit emphasized that "[s]ince *Hooks*, [it had] consistently held

that there is no federal constitutional right to counsel in postconviction proceedings," *id.*, and concluded that it was "constrained to follow *Hooks* and its progeny," Pet. App. A-7.

More to the point for present purposes, the Eleventh Circuit held that even absent *Hooks*, it was "nonetheless bound by United States Supreme Court precedent, which preclude[d it] from granting the inmates the relief they seek." *Id.* Specifically, the court of appeals found that petitioners' access claim was foreclosed by this Court's decisions in *Ross v. Moffitt*, 417 U.S. 600, *Pennsylvania v. Finley*, 481 U.S. 551, *Murray v. Giarratano*, 492 U.S. 1, *McCleskey v. Zant*, 499 U.S. 467 (1991), and *Coleman v. Thompson*, 501 U.S. 722, all of which hold – the latter two expressly in death-penalty cases – that there simply is no right to taxpayer-funded post-conviction counsel (either as such or as an adjunct to the right of access). Pet. App. A-7-8. The Eleventh Circuit rejected petitioners' effort to distinguish *Giarratano* on the basis that it was "only a plurality decision." Pet. App. A-8. The problem, the court of appeals explained, was that "even assuming that *Giarratano* is inapplicable to their claims, the inmates ignore[d] the significance of [the] pre-*Giarratano* and post-*Giarratano* cases" listed above. *Id.*

Having rejected petitioners' counsel-as-an-adjunct-to-court-access claim, the Eleventh Circuit briefly disposed of petitioners' "lesser form of legal assistance" claim as well as their contention that the Sixth and Eighth Amendments, having "evolve[d] as times change[d]," combined to provide death-sentenced inmates a right to post-conviction counsel as such. With respect to the former, the court of appeals simply noted that "in order to determine whether the inmates have a valid access claim," it needed to know what sort of other "assistance" the inmates thought they were entitled to. Pet. App. A-9. Because petitioners had not identified with any specificity the kind of non-lawyer assistance they wanted, the Eleventh Circuit found that it could not grant the inmates relief. *Id.*

With respect to petitioners' evolutionary Sixth/Eighth Amendment hybrid claim, the Eleventh Circuit first emphasized that the Sixth Amendment had no role to play because, by its terms, it "applies only to criminal proceedings" and because "postconviction relief is not part of the criminal proceeding itself" but, rather, "is civil in nature." Pet. App. A-10. Nor, the court of appeals held, did the Eighth Amendment aid petitioners' cause. While it is true that this Court has construed the Constitution to "place[] special constraints on the procedures used to convict an accused of a capital offense," the Eleventh Circuit reiterated this Court's observation that "those constraints have all related to the trial stage of capital adjudication, 'where the court and jury hear testimony, receive evidence, and decide the questions of guilt and punishment.'" Pet. App. A-10 (quoting *Giarratano*, 492 U.S. at 8-9). Because state collateral proceedings are not part of the trial phase of a capital case, "[h]eightened procedural requirements do not" – by dint of the Eighth Amendment – "apply in the context of postconviction proceedings." *Id.*

The court of appeals closed its opinion by acknowledging that "[i]f we lived in a perfect world, which we do not, we would like to see the inmates obtain the relief they seek in this case." Pet. App. 11-A. But, the court said that, its own policy preferences aside, it was "bound by United States Supreme Court precedent, as well as [its] own precedent, which clearly establish that the United States Constitution does not afford appointed counsel on collateral review." *Id.*

B. Restatement of the Facts

As shown below, petitioners' legal arguments here are remarkably weak. Unless this Court is prepared to jettison the 30 years' worth of precedent on which the Eleventh Circuit's decision here comfortably rests, that court's judgment should stand. Perhaps recognizing as much, petitioners aim to de-emphasize the law and emphasize what they call the "[f]acts." Pet. at 8-22. Specifically, petitioners spend the bulk of their brief trying to convince the Court of two

things: first, that there are scads of helpless "unrepresented condemned inmates" on Alabama's death row (*e.g.*, Pet. at 13, 16, 32); and second, that the rules and procedures governing post-conviction review in Alabama are hopelessly complex (Pet. at 12-19). Neither of those things is even remotely true. Pursuant to its duty under Rule 15.2 to correct the material "misstatement[s] of fact [and] law" in the petition, the State will now try to set the record straight.

1. Petitioners' Persistent Suggestion That There Are Scores Of Alabama Death-Row Inmates Without Post-Conviction Representation Is Categorically False.

Most conspicuously, petitioners repeatedly charge that Alabama death-row inmates routinely go it alone, without legal assistance, in state post-conviction (here, "Rule 32") proceedings. "*This* record," petitioners assert, "shows that death-row prisoners in Alabama *have* 'been unable to obtain counsel to represent ... [them] in postconviction proceedings.'" Pet. at 4. Indeed, petitioners go so far as to say that "the Court of Appeals below acknowledged" that "Alabama's condemned inmates are unable to obtain postconviction representation." Pet. at 29. As support for that latter contention, petitioners offer a quotation (or a fabricated quotation, as it turns out) from the Eleventh Circuit's opinion in which that court noted that petitioners had "cite[d] cases in which [unrepresented] death-sentenced inmates' postconviction petitions were dismissed on procedural or limitations grounds as proof of actual injury." *Id.* (quoting Pet. App. A-5). Incredibly, petitioners took the liberty of inserting the key word "unrepresented," shown in brackets above, into the sentence they quote. That word – the whole ball of wax here – appears *nowhere* in the Eleventh Circuit's opinion.

Unfortunately, petitioners' creative editing is merely indicative of a grander and more

systematic effort at mischaracterization.[1] Time and time again, petitioners assert – without any documentation whatsoever – that Alabama death-row inmates regularly proceed *pro se* in Rule 32 proceedings. *See, e.g.*, Pet. at i ("unrepresented death-row inmates"); *id.* at 3-4 ("unrepresented death-row inmates"); *id.* at 5 ("numerous unrepresented death-sentenced prisoners"); *id.* (inmates "without legal assistance"); *id.* at 12 (inmates "[w]ithout counsel to assist them"); *id.* at 13 ("unrepresented condemned inmate"); *id.* at 14 ("incarcerated, unassisted, legally uneducated inmates"); *id.* ("[u]nrepresented death-sentenced prisoners"); *id.* at 15 ("unrepresented inmates"); *id.* at 16 ("Alabama's unrepresented condemned inmates"); *id.* at 24 ("unrepresented death-row inmates"); *id.* at 29 (inmates "unable to obtain postconviction representation"); *id.* at 31 ("unrepresented death-row inmates"); *id.* at 32 ("unrepresented condemned inmates"). That is categorically – and demonstrably – false.

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[1] In fact, this is not even the first time that petitioners have doctored a quotation to suit their own needs. In their brief to the Eleventh Circuit, petitioners misrepresented the district court's decision as having held 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.'" C.A. Blue Br. 38. There, as here, the bracketed language was petitioners' own, not the court's, and there, as here, the resulting alteration was both significant and misleading. What the district court's opinion *actually* says is that making state-funded post-conviction counsel the *sine qua non* of inmates' right of access to the courts

> would effectively nullify the Supreme Court's holding in *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L.Ed.2d 640 (1991), that "*Finley* and *Giarratano* established that there is no right to counsel in state collateral proceedings." *Id.* at 755, 111 S. Ct. 2546. It would be odd indeed that the unenumerated right of access would swallow the whole Sixth Amendment jurisprudence related to postconviction proceedings.

Pet. App. A-56-57. Clearly, with their bracketed addition, petitioners were trying to convey the misimpression that this case all comes down to *Giarratano*, which, as a plurality opinion, petitioners believe they can distinguish. But as the district court's actual language makes plain, and as we will explain in greater detail (*see infra* at 27-35), there is much more precedent – including on-point, full-Court, pre- and post-*Giarratano* decisions like *Finley* and *Coleman* – that petitioners must overcome if they are to prevail here.

Noticeably absent from the petition are any specifics to back up the assertion that Alabama death-row inmates routinely go unrepresented in post-conviction proceedings. The petition's silence on that score is as unsurprising as it is deafening. Petitioners made similar allegations in their briefs to the Eleventh Circuit. *See, e.g.*, C.A. Blue Br. 6, 8, 13, 24. Those allegations were exposed there as blatant misrepresentations. *See, e.g.*, C.A. Red Br. 40-52. Seemingly determined not to let the facts to get in the way of a good story, petitioners continue in this Court to spin and mischaracterize. The State will therefore once again demonstrate, in painstaking detail, and by reference to specific cases and record evidence, that in fact Alabama death-row inmates are overwhelmingly, if not uniformly, represented in Rule 32 proceedings by superbly qualified counsel.

a. *The named plaintiffs all have the assistance of qualified post-conviction counsel.*

Let's start with the named plaintiffs. Every one of the eight named plaintiffs enjoyed (or presently enjoys) the assistance of counsel in state post-conviction proceedings. Every one of the named plaintiffs filed a timely Rule 32 petition. Every one of the named plaintiffs had or will have a formal evidentiary hearing on his claims in state court. And importantly here, six of the eight had counsel *before* their initial Rule 32 petitions were filed:

James Borden[2]	Attorneys Bryan Stevenson and Angela Setzer of the Equal Justice Initiative ("EJI") filed on Borden's behalf a 132-page petition asserting some 89 claims. Doc. 86, App. 1, ¶7.
Eugene Clemons	Five attorneys from the global law firm of Winston & Strawn and two attorneys from one of Alabama's premier law firms, Bradley,

[2] Borden is no longer on death row. Following Borden's (counseled) appeal of the denial of his Rule 32 petition, the State asked the Court of Criminal Appeals to remand the case for an evidentiary hearing concerning Borden's mental-retardation claim and then, at the hearing, stipulated "that Mr. Borden is mentally retarded" and, therefore, that "his death sentence is prohibited as a matter of law." *Borden v. State*, 2004 WL 362256 (Ala. Crim. App. 2005).

	Arant, Rose & White, jointly filed on Clemons' behalf a 36-page petition asserting some 25 claims. Counsel followed up with a 51-page, 5-claim amended petition and a 70-page, 5-claim second amended petition. Doc. 86, App. 3, ¶¶9, 18-19.
Gary Hart[3]	A team of lawyers from the leading Minnesota firm of Rider, Bennett, Egan & Arundel, assisted by local counsel Henry Brewster, filed on Hart's behalf an 80-page petition asserting some 50 claims. Doc. 86, App. 4, ¶5.
James Callahan	EJI attorney Randall Susskind filed on Callahan's behalf a petition asserting 56 separate ineffective-assistance claims, one prosecutorial misconduct claim, one juror misconduct claim, and 32 assorted claims of trial error. Doc. 86, App. 5, ¶¶2-3; *Callahan v. State*, 767 So. 2d 380, 384-404 (Ala. Crim. App. 1999).
Glen Holloday	Attorney Oliver Loewy of the Alabama Capital Representation Resource Center (now EJI) filed on Holloday's behalf a 41-page petition asserting some 15 principal claims with 23 unlabeled subparts. Doc. 86, App. 6, ¶¶5, 7.
Tony Barksdale	EJI attorney Sonya Rudenstine filed on Barksdale's behalf a 64-page petition asserting some 19 claims, most with numerous sub-claims. Doc. 86, App. 7, ¶4.

The other two named plaintiffs – Christopher Barbour and Anthony Tyson – initially filed what were formally styled "*pro se*" Rule 32 petitions. Neither pleading, however, would appear actually to have been prepared without the assistance of counsel. Barbour's pleading was "a 55-page typewritten document that raised numerous claims with citations to the trial transcript and case authority" (Doc. 86, App. 2, ¶2), and Tyson's was "102 pages in length" and "consisted of 218 numbered paragraphs" (Doc. 86, App. 8, ¶4). And in fact, lead class counsel Bryan Stevenson has admitted that EJI "provided assistance" in preparing the pleadings of "all but one petitioner" who filed nominally "*pro se*" petitions between August 1996 and August 2003 – a

[3] Hart is no longer on death row. He was resentenced to life in prison in accordance with *Roper v. Simmons*, 543 U.S. 551 (2005). *See* Order, *Hart v. State*, No. CC89-2737.60 (Mobile County Cir. Ct. Aug. 16, 2005).

period that includes both Barbour's (March 7, 1997[4]) and Tyson's (May 17, 2002[5]) petitions. Doc. 91, Tab 23, ¶37; *see also* Doc. 91, p.4-5.

In any event, having filed his nominally "*pro se*" Rule 32 petition, Barbour was formally appointed counsel, who promptly filed an amended petition. After allowing for Barbour's transportation to the UAB's Kirklin Clinic for neuropsychological testing, the state trial judge held an evidentiary hearing on Barbour's (counseled) petition and denied it in a lengthy written order. Doc. 86, App. 2, ¶3. Barbour was subsequently represented in state-court proceedings and is now represented on federal habeas by George Kendall of Holland & Knight and Miriam Gohara of the NAACP Legal Defense Fund. Doc. 86, App. 9, pp.6, 21.

Tyson, too, was appointed Rule 32 counsel before any action was taken on his petition. Petitioners' emphasis on the fact that counsel was not appointed immediately upon request – and their conspiracy theory concerning what might have motivated the trial judge to appoint counsel when he did – misses the point entirely. Pet. at 18 n.31. The point, which petitioners do not contest, is that Tyson suffered absolutely no prejudice as a result of his temporarily (and, again, only nominally) "*pro se*" status. The State informed the trial judge by letter that it did "not intend to move to dismiss Tyson's petition until [the judge] appoint[ed] Tyson counsel to defend against any such motions." Doc. 86, App. 8, Exh. K. And, again, counsel *was* appointed to litigate Tyson's Rule 32 petition. Doc. 86, App. 8, ¶14. To this date, Tyson's timely-filed petition remains pending in the trial court. *Id.* ¶16.

In its brief to the Eleventh Circuit, the State offered an essentially identical evidentiary accounting of the named plaintiffs' cases, highlighting, specifically, the participation of their

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[4] Doc. 86, App. 2, ¶2.

[5] Doc. 86, App. 8, ¶4.

lawyers. Tellingly, petitioners have never (there or here) even attempted a point-by-point rebuttal.

b. ***Almost without exception, all other Alabama death-row inmates have the assistance of qualified post-conviction counsel.***

Even moving beyond the named class plaintiffs, it is difficult to square with reality petitioners' assertion that finding volunteer lawyers "is often impossible." Pet. at 17. Evidence introduced in the district court conclusively demonstrated that of the 130 inmates then on Alabama's death row, *all but three* were formally represented by counsel. Doc. 86, App. 9, p.5. (As to the remaining three, see *infra* note 8.) It is worth looking closely at the sorts of lawyers who represent Alabama death-row inmates. They are an impressive bunch and, relative to the State of Alabama (whose budgetary issues require no explanation), a well-heeled bunch, too.

First, 92 of the 127 inmates are "represented by out-of-state law firms and/or public interest groups." *Id.* The list of out-of-state law firms alone reads like an honor roll of the American legal community. Among the heavy-hitters:

Cravath	Covington & Burling
Sullivan & Cromwell	Kirkland & Ellis
Paul, Weiss	Wilmer Hale
White & Case	Shearman & Sterling
Ropes & Gray	Wiley Rein
Kaye Scholer	Winston & Strawn
Sonnenschein	DLA Piper

Id. at 6-26. Add to these private firms death-penalty experts from the University of Chicago Law School, Cornell Law School, the Innocence Project, the NAACP, and the Southern Center for Human Rights. *Id.*

Pointing to what they call "the economic realities of the legal profession," petitioners express concern that "lawyers who volunteer to represent Alabama death-row inmates in state postconviction proceedings are compelled to work at less than the federal minimum wage" or are otherwise asked to "make a heavy financial sacrifice." Pet. at 11 & n.20. No need to worry. *The American Lawyer*'s annual "AmLaw 100" list, just published, shows that, on average, the law firms listed above generate almost $720 million in annual revenues, *see Eleven Firms Break the Billion Dollar Mark*, The American Lawyer 161-62 (May 2007), and that the average – *average* – partner at one of those firms nets more than $1.85 million per year, *see Partner Profits Soar*, The American Lawyer 181 (May 2007).[6] Young lawyers, of course, are doing pretty well, too. Associates – whose salaries continue to skyrocket even as this brief goes to press – now start at $160,000 in large Washington and New York firms; senior associates make close to $300,000. *See* E. Goldberg & B. Hallman, *To the Moon: Is Raising Salaries the Best Way To Retain Associates?*, The American Lawyer 20 (March 2007); *see also* Above the Law, *Skaddenfreude Archives*, http://www.abovethelaw.com/skaddenfreude/ (visited May 9, 2007) (reproducing firm announcements and memoranda). What is more, these large law firms' *human* resources also far outstrip the State's; the firms listed above employ, on average, nearly 800 lawyers, *see Partner Profits Soar*, The American Lawyer 181 (May 2007), roughly 10 times the Alabama Attorney General's entire attorney workforce.

Second, 18 Alabama death-row inmates are "represented by lawyers from the Equal Justice Initiative of Alabama." Doc. 86, App. 9, p.5. EJI boasts a star-studded cast. EJI's Executive Director (and lead class counsel here) Bryan Stevenson is, by all accounts, one of the nation's leading capital-litigation experts; he is a law professor at New York University School

[6] By comparison, the Alabama Attorney General's *entire attorney payroll* is about $7.3 million.

of Law and a graduate of Harvard Law School and Harvard's Kennedy School of Government. Doc. 86, App. 1, Exh. A; *see also* Equal Justice Initiative of Alabama: EJI Staff, http://www.eji.org/staff.html (visited May 9, 2007). EJI's staff lawyers have similarly impressive résumés: two, in addition to Stevenson, graduated from Harvard Law; one from Stanford; six from NYU; two from Michigan; and one from Georgetown. *Id.* Three EJI lawyers clerked for federal appellate judges, and another clerked for a state supreme court justice. *Id.* One EJI lawyer is a former Rhodes Scholar. *Id.*[7]

Finally, 17 Alabama death-row inmates are represented by Alabama-based attorneys. Doc. 86, App. 9, p.5. Among others, lawyers at in-state megafirms Bradley, Arant, Rose & White and Maynard, Cooper & Gale have stepped up to represent Alabama death-row inmates in post-conviction proceedings, as have lawyers from the Southern Poverty Law Center. *See id.* at 6-26.[8]

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[7] For at least three years running, EJI has been awarded IOLTA grants by the Alabama Bar Association's Alabama Law Foundation to cover "operating expenses." *Alabama Law Foundation Announces 2006 Grants*, Alabama Law Foundation, http://www.alfinc.org/whatsnew_story.cfm?articleid=18 (visited May 9, 2007); *see also Alabama Law Foundation Announces 2005 IOLTA Grants*, Alabama Law Foundation, http://www.alfinc.org/whatsnew_story.cfm?articleid=10 (visited May 9, 2007). Petitioners' assertions that the State does not "provide any funding to private organizations that attempt to recruit volunteer private counsel for condemned inmates" (Pet. at 9) and that EJI, specifically, "relies entirely upon private support" (C.A. Blue Br. 8) are thus quite misleading.

[8] As to the three inmates who, according to State records, were not initially appointed post-conviction counsel:

(1) Rayford Hagood filed a 74-page typewritten Rule 32 petition containing 170 paragraphs and "numerous complex grounds for relief." Doc. 86, App. 10, ¶5. In all likelihood, Hagood's nominally "*pro se*" petition, which was filed June 26, 2002, was ghost-written by EJI lawyers. *See supra* at 9-10 (EJI "assist[ed]" 18 of 19 death-row inmates filing "*pro se*" petitions between August 1996 and August 2003). The State moved for partial dismissal of Hagood's petition and, simultaneously, urged the trial judge to formally appoint counsel. Doc. 86, App. 10, ¶6. The trial court appointed two lawyers and on September 27, 2004, held an evidentiary hearing. The trial court denied relief, and Hagood (through counsel) appealed. Hagood has since passed away.

Again, the State said all of this in its brief to the Eleventh Circuit. And again, petitioners have never, either there or here, attempted to counter it.

c. *Who doesn't have the assistance of qualified post-conviction counsel?*

So who, exactly, *has* gone through post-conviction proceedings without representation? The petition is conspicuously circumspect with respect to that fundamental question. In the Eleventh Circuit, petitioners premised their argument on the assertion that "[i]n Alabama, seven death-row prisoners have recently gone through postconviction proceedings without a lawyer." C.A. Blue Br. 40. The State showed petitioners' assertion concerning the "seven" to be false and indefensible (C.A. Red Br. 47-52), and, not surprisingly, petitioners have not repeated it here.

Instead, in this Court petitioners mention only two inmates, Donald Dallas and Joseph Smith (Pet. at 14-16). Neither reference remotely supports petitioners' position. Dallas filed a nominally "*pro se*" Rule 32 petition in September 1999. Doc. 86, App. 14, ¶5. His petition was almost certainly prepared by an EJI attorney; not only was it filed within the seven-year window during which EJI "assist[ed]" all but one purportedly "*pro se*" Rule 32 petitioner (*see supra* at 9-

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(2) Eddie Powell on September 20, 2002, filed a "*pro se*" Rule 32 petition (Doc. 86, App. 11, ¶5), which, again, was probably ghost-written by EJI lawyers. Thereafter, attorney Leslie Smith of the Federal Defenders Office entered an appearance and filed on Powell's behalf two amended petitions. On July 7, 2004, the trial court dismissed Powell's amended – *i.e.*, counseled – petitions and, in so doing, found that even Powell's purportedly "*pro se*" petition must have been prepared with the assistance of counsel. *Powell v. State*, No. CC-1995-1020.60 (Tuscaloosa County Cir. Ct. July 7, 2004).

(3) Marcus Williams on September 20, 2002, filed a "*pro se*" petition (Doc. 86, App. 12, ¶4), which, likewise, was probably ghost-written by EJI lawyers. The trial judge initially dismissed Williams' petition on statute-of-limitations grounds but then, at the State's behest, reinstated the petition when an intervening Alabama Supreme Court decision made clear that the judge's limitations-based ruling was erroneous. Thereafter, two attorneys from the Federal Defenders Office entered appearances and filed an amended petition. That petition was subsequently denied.

10), but it was also 108 pages long, contained 207 numbered paragraphs, and "presented numerous complex grounds for relief." *Id.* "It would be incredible to believe that Dallas, an individual who 'does not read well' and who only has a sixth-grade education, managed to file a very lengthy, type-written Rule 32 petition *pro se*." *Id.* (quoting C.R. 386). In any event, the Rule 32 trial court subsequently appointed attorney Beverly Howard to represent Dallas and held an evidentiary hearing on Dallas' claims; Dallas called four witnesses at the hearing and deposed two others. *Id.* ¶¶7-8. The trial court thereafter dismissed Dallas' petition. Dallas is currently represented on federal habeas by the Federal Defenders Office. Doc. 86, App. 9, p.22.[9]

The reference to Smith doesn't add much. Smith filed a nominally "*pro se*" – but, again, almost certainly ghost-written – Rule 32 petition in September 2002. Given the state courts' then-recent holdings that the post-conviction statute of limitations is "mandatory" and "jurisdictional," *Williams v. State*, 783 So. 2d 135, 137 (Ala. Crim. App. 2000) – presumably precluding the cure of any violation – the State moved to dismiss Smith's petition on timeliness grounds. The circuit court dismissed Smith's petition as late, but the Alabama Supreme Court reversed. Smith's lawyer (Mr. Domingo Soto, Esq.) then filed an amended Rule 32 petition, which the circuit court denied as procedurally barred in a few respects and as meritless in numerous others. Smith's lawyer subsequently missed the deadline for noticing his appeal, and the Court of Criminal Appeals dismissed the appeal as untimely. Smith's lawyer thereafter

[9] It is true that the Rule 32 court dismissed one of Dallas' claims – a juror misconduct claim – before Howard was formally appointed to represent him. Pet. at 14-15. Before dismissing, however, the trial judge gave Dallas 14 days to amend the claim to comply with procedural requirements. Notwithstanding the aid that Dallas was fairly obviously receiving from EJI – aid that renders hollow petitioners' current assertion of Dallas' inability "to interview witnesses or gather records from his cell on death row" (Pet. at 15) – he failed to do so. Once appointed, attorney Howard likewise "never attempted to amend or otherwise revive Dallas's juror misconduct claim." Doc. 86, App. 14, ¶7.

moved for permission to file an out-of-time appeal. The State consented to Smith's lawyer's request, and the court allowed the appeal to go forward. The appeal was orally argued (by counsel) in February 2007 and remains pending to this day.[10]

* * *

One final point. There is nothing to petitioners' assertions that "Alabama's burgeoning death-row population has exhausted the available sources of volunteer, *pro bono* lawyers, instate or outstate" (Pet. at 32) and, therefore, that reliance on volunteer attorneys "is no longer possible" (C.A. Grey Br. 18 n.20). Again, absolutely, positively false. Since the record in this case closed in 2003 (and, in fact, since 2005), the global law firm of Sidley Austin ***alone*** has entered appearances in 17 post-conviction cases representing Alabama death-row inmates – specifically, inmates John Russell Calhoun, Renard Daniel, Timothy Flowers, Keith Edmund Gavin, Alan Eugene Miller, Willie D. Minor, Cuhuatemoc Peraita, Stephen Pilley, Matthew Reeves, Willie Earl Scott, Willie B. Smith, William A. Snyder, Wayne Hollaman Travis, Darryl Turner, Charlie Washington, James Donald Yeomans, and William John Ziegler. Clearly, the system is not approaching a breaking point, as petitioners misleadingly suggest.

In any event, the State, like the district court here, "will not belabor the point" (Pet. App. A-55), which is simply this: At the end of the day, it is simply, categorically, and verifiably untrue that (as petitioners' complaint says) "there are many death row prisoners who are currently without legal representation and who are not able to file proceedings pursuant to Rule

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[10] It is not State practice to move to dismiss any Rule 32 petition that is ***truly*** *pro se* – as opposed to one that is either formally counseled or obviously ghost-written. When, on the very rare occasion that a truly *pro se* petition is filed, the State does not move to dismiss but, rather, moves to have counsel appointed. We are aware of only one instance – petitioners to our knowledge have not pointed to any – in which the State has moved to dismiss a truly *pro se* petition: Inmate Michael Wayne Eggers refused the State's effort to have counsel appointed for him.

32 of the Alabama Rules of Criminal Procedure or under 28 U.S.C. §2254." Doc. 1, p.14. Stripping away the rhetoric about impending systemic crisis, the impossibility of finding volunteer counsel, and the scads of "unrepresented condemned inmates," the *reality* is that, almost without fail, death-row inmates in Alabama in fact have the assistance of superbly qualified counsel in preparing, presenting, and litigating post-conviction challenges to their convictions and sentences. The Constitution, as we will explain, does not require that result, but, happily, in practice, that result obtains nonetheless.

2. Petitioners' Assertion That Alabama Post-Conviction Procedures Are Hopelessly Complex Is Likewise Categorically False.

Petitioners also repeatedly warn of what are, they say, the "rigorously technical" rules that govern post-conviction practice in Alabama – rules, they continue, that an "unrepresented condemned inmate cannot typically comply with." Pet. at 13. Specifically, petitioners point to three features of Alabama post-conviction procedure: first, Rule 32.2's procedural-default provision, which, they say, comprises several "elaborate preclusion doctrines" (Pet. at 13); second, Rule 32.6(b)'s requirement that a petitioner give "a clear and specific statement of the grounds upon which relief is sought" and the facts underlying those grounds (Pet. at 14); and third, Rule 32's one-year statute of limitations (Pet. at 15-16).

There are several points worth making in response. *First*, petitioners nowhere contend that the rules about which they complain are *inherently* inscrutable; rather, they contend only that a truly *pro se* inmate might have trouble complying with them. *See, e.g.*, Pet. at 13-14 ("death-row inmate without counsel" could have difficulty understanding preclusion rules); *id.* at 14 ("[u]nrepresented death-sentenced prisoners," "unrepresented inmates" could have difficulty with pleading requirements); *id.* at 15 (inmates might not be able to meet filing deadlines "without counsel's assistance"). As just demonstrated, though, there are very few – if any – truly

pro se death-row inmates in Alabama's post-conviction system. Accordingly, the difficulties that petitioners envision will rarely, if ever, materialize.

Second, and in any event, there is nothing particularly confusing or onerous about Alabama's procedural-default rules or pleading requirements. As for the former, what petitioners call the "elaborate preclusion doctrines" are actually reducible to one simple and straightforward rule, which reflects the commonsense notion that a post-conviction proceeding is not just a do-over of the trial and direct appeal: If a claim was or could have been raised at trial or on appeal, it cannot be raised during Rule 32 proceedings. Accordingly, as petitioners now seem to appreciate quite clearly (Pet. at 15), the claims litigated on Rule 32 typically allege ineffective assistance of counsel, *Brady* violations, or juror misconduct.

Nor is there anything unduly taxing about Rule 32's requirement that a post-conviction petitioner give a "clear and specific statement" of the grounds for his attack and provide facts to support it. In fact, an inmate wishing to file a Rule 32 petition need only complete a simple, boilerplate, fill-in-the-blank form apprising the court of the most basic information pertinent to his case. *See Lewis v. Casey*, 518 U.S. 340, 352 (1996) (indicating that provision of "forms that asked the inmates to provide only the facts and not to attempt any legal analysis" would satisfy access-to-courts requirement). The form, which is in the record (Doc. 86, App. 13) and which we have attached as an addendum, contains a straightforward list of grounds on which an inmate might potentially base a Rule 32 petition; an inmate is asked simply to check from the list any ground that he feels applies to his case and to summarize the basic facts pertinent to each claim. *Id.*, p.316. The form apprises the inmate of his right to proceed *in forma pauperis*, reminds him to include all grounds for relief, and reassures him that "[n]o citation of authorities need be furnished." *Id.*, p.312. The form is an appendix to Alabama Rule of Criminal Procedure 32 and

is available at Holman and Donaldson Correctional Facilities, where death-row inmates are housed. Doc. 86, p.55 n.10. All an Alabama inmate needs to do to stop the clock on his state and federal[11] post-conviction actions is to timely file the form that has been provided to him.

What is more, Alabama Supreme Court precedent makes clear that once an inmate (whether nominally "*pro se*" or not) files his initial Rule 32 petition, he then has an essentially unfettered opportunity, with the assistance of counsel, to amend that petition to add new claims. The "relation back" does *not* apply to limit amendments to Rule 32 petitions, and, indeed, the *only* bases on which an amendment may be denied are (1) undue prejudice to the State and (2) undue delay. *See Ex parte Jenkins*, __ So. 2d __, __, 2005 WL 796809, at *2-*5 (Ala. 2005); *Ex parte Rhone*, 900 So. 2d 455, 457-59 (Ala. 2004). Accordingly, all an inmate needs to do to get into court (and thereby toll AEDPA's statute of limitations) is to file, for instance, either a single-claim petition or the fill-in-the-blank form. He can then add detail – and, for that matter, entirely new claims – as he goes along.[12]

Third, contrary to petitioners' insinuations, there is nothing novel about the procedures that govern post-conviction practice in Alabama. The concept of procedural default, of course, is not Alabama's creation, but this Court's. *See Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (claim that could have been but was not raised at trial defaulted on federal habeas). Nor is Alabama unique in enforcing procedural-default and issue-preclusion rules in state post-conviction proceedings. *See, e.g.*, Ga. Code §9-14-48(d) (issue that could have been but was not raised at trial or on appeal defaulted on state habeas); *Gaither v. Gibby*, 475 S.E.2d 603, 604 (Ga.

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[11] 28 U.S.C. §2244(d)(2) (properly filed state petition tolls one-year limitation period applicable to federal habeas corpus application).

[12] The risk, therefore, that an inmate would need to eat up the limitations period searching for counsel to represent him (Pet. at 21-22) is, or should be, nonexistent.

1996) ("[A]ny issue raised and ruled upon in the petitioner's direct appeal may not be reasserted in habeas corpus proceedings."); *Oates v. Dugger*, 638 So. 2d 20, 21 (Fla. 1994) ("Postconviction motions cannot be used as a second appeal for issues that were or could have been raised on direct appeal."). Alabama's clear-statement pleading rule and statute of limitations are likewise staples of post-conviction practice. *See, e.g.*, Rule 2(c), Rules Governing Section 2254 Cases in the United States District Courts (federal habeas petition "shall specify all the grounds for relief which are available to the petitioner," "shall set forth in summary form the facts supporting each of the grounds thus specified," and "shall state the relief requested"); 28 U.S.C. §2244(d)(1) (federal habeas petitions subject to "1-year period of limitation").[13]

Fourth and finally, it is notable that, so far as the current lawsuit is concerned, Alabama's prisons, including those that house death-row inmates (Holman and Donaldson), must be presumed to have adequate law libraries. *See Arthur v. Allen*, 452 F.3d 1234, 1250-51 (11th Cir. 2006) (finding Alabama's death-row library facilities constitutionally adequate), *cert. denied*, 549 U.S. __ (Apr. 16, 2007) (No. 06-954). Petitioners here, notably, do not allege that the law library at either prison is deficient in any way. Their complaint does not contend that the prisons' library facilities are inadequate, nor does it request any alteration of those facilities. And although petitioners indicated some dissatisfaction with the library arrangement in a footnote to one of their district-court pleadings (Doc. 91, p.3 n.2), they did not pursue that issue in their principal brief to the Eleventh Circuit – not even in the portion seeking "other forms of

[13] Petitioners make much of the fact that Assistant Attorneys General often prepare proposed orders for judges in state post-conviction cases. Pet. at 17-18. There is, of course, nothing inherently sinister about that practice, *see, e.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 571-73 (1985), and petitioners have pointed to no evidence to suggest that the practice is being abused in the Alabama post-conviction process. Further, it is worth remembering that the state trial judges who handle Rule 32 petitions in Alabama do not have the resources (*e.g.*, 4-5 law clerks, full secretarial staff) that many federal judges enjoy.

legal assistance (short of attorneys)," C.A. Blue Br. 45-48 – nor have they pursued it in their petition to this Court. Any contention that the prisons' law libraries are constitutionally inadequate, therefore, is waived. *See, e.g.*, Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *United States v. Levy*, 416 F.3d 1273, 1275 (11th Cir. 2005) (argument not raised in appellant's opening brief is waived).[14] Importantly, even at the high-water mark of this Court's access-to-courts jurisprudence, it was clear that a State's maintenance of an "adequate law librar[y]" was *itself* sufficient to satisfy constitutional obligations. *Bounds*, 430 U.S. at 828; *accord* Pet. App. A-6 (Eleventh Circuit) ("*Bounds* referred to 'law libraries *or* other forms of legal assistance, in the disjunctive, no fewer than five times.'").

* * *

In local media coverage of this case, lead class counsel Bryan Stevenson was recently quoted as saying, "I don't know why any state that wants to fairly administer the death penalty would want Death Row inmates unrepresented by lawyers." *The Real World*, The Birmingham News (Apr. 15, 2007). The statement, with respect, is both loaded and misleading. The State of Alabama takes capital punishment to be its most solemn responsibility and believes passionately in a "fair[] administ[ration]" of the death penalty. And, of course, no one "want[s]" condemned inmates to go "unrepresented by lawyers" during post-conviction proceedings. Thankfully, as we have demonstrated (again), with exceptions so rare that petitioners have not been able credibly to point to a single one, condemned inmates in Alabama *do not* go unrepresented.

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[14] If petitioners wanted to file a separate lawsuit challenging the adequacy of the library facilities, they could of course do so. *But see Arthur*, 452 F.3d at 1250-51 (indicating that any such challenge would fail). No such challenge, however, is part of this action. *See* Pet. at i.

The lawyers who represent Alabama's death-row inmates in post-conviction proceedings perform an admirable and valuable service, and they are to be commended for their devotion to their clients' causes. The post-conviction process is undoubtedly better served as a result of their participation. Why, then, doesn't Alabama, as a matter of course, formally appoint lawyers to represent death-sentenced inmates in post-conviction proceedings? For two reasons, both of which this Court has acknowledged as sensible and legitimate. First, because "the state trial on the merits [is] the 'main event' ... rather than a 'tryout on the road' for" later post-conviction proceedings, *Wainwright*, 433 U.S. at 90, and because "direct appeal is the primary avenue for review of a conviction or sentence," *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). And second, because "at the present time" Alabama, like other States, has "f[ound] that other claims for public funds within [and] without the criminal justice system preclude the implementation" of a full-blown program for the provision of post-conviction counsel. *Ross v. Moffitt*, 417 U.S. 600, 618 (1974). The point, simply, is that the State of Alabama has limited resources. By focusing its funding efforts on the crucial trial and direct-appeal phases of capital litigation,[15] the State has attempted, in good faith, to steward those limited resources to society's maximum advantage. *See Giarratano*, 492 U.S. at 11 (A State "may quite sensibly decide to concentrate the resources it devotes to providing attorneys for capital defendants at the trial and appellate stages of a criminal proceeding.").[16]

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[15] At trial, appointed counsel are paid $60 per hour for in-court work and $40 per hour for out-of-court work. Importantly, in capital cases, "there shall be no limit on the total fee." Ala. Code §15-12-21(d). On appeal, each appointed lawyer on a defendant's team is paid $60 per hour, up to a total of $2000 per lawyer for each appellate phase. *Id.* §15-12-22(d). In addition, Alabama precedent provides, over and above the statutory fee, for the reimbursement of appointed attorneys' "office overhead" expenses. *May v. State*, 672 So. 2d 1307 (Ala. Crim. App. 1993).

[16] It goes without saying that the cost of any appointment program that might satisfy petitioners would be substantial. Cost, of course, is not a dispositive consideration, but it is not irrelevant,

The question here, in any event, is not whether as a matter of policy or defense strategy it would be *better* for Alabama to appoint local lawyers (at $1000 total per case, *see* Ala. Code §15-12-23) to represent inmates in Rule 32 proceedings than to rely on the efforts of typically well-funded out-of-town volunteers. (Given the vigorous and uniformly excellent representation Alabama inmates receive from volunteer counsel, the answer to that policy question is not at all obvious.) The question is whether, given current circumstances – tight budgets, other pressing fiscal issues, etc. – Alabama is *constitutionally required* to choose the former course over the latter. It quite clearly is not. *See, e.g.*, *Ross*, 417 U.S. at 616. ("[T]he fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required.").

REASONS FOR DENYING THE PETITION

There are a few points worth emphasizing at the outset. Petitioners do not allege that the Eleventh Circuit's decision here implicates any split of authority that requires resolution. *See* Sup. Ct. R. 10(a). Indeed, save for a single footnote reference (Pet. at 13 n.24), petitioners don't even *cite* any decisions arising outside the Eleventh Circuit – or outside Alabama, for that matter. Nor do petitioners allege that the Eleventh Circuit's decision here implicates a question of national importance. *See* R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* §4.2, at 223 (8th ed. 2002) ("The Court has traditionally expended its time and resources on those cases that present issues of national importance ...."). Quite the contrary, petitioners repeatedly stress that the question they present pertains *only* to the specific "conditions facing Alabama death-row inmates in 2007." Pet. at 4. *See also, e.g.*, Pet. at 1 ("Alabama ... is the only State ..."); *id.*

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either – particularly given that it buys no clear advantage, in terms of the quality of representation rendered, relative to prevailing practice.

(same); *id.* at 8 ("Except for Alabama ..."); *id.* (same); *id.* at 27 (same). Petitioners seem to try (Pet. at 3-4, 27-28) to portray the Eleventh Circuit's decision as one that "conflicts with relevant decisions of this Court" (Sup. Ct. R. 10(c)), but, ultimately, they are forced to ask this Court to "reconsider[]" its existing precedent (Pet. at 25-27) and to explain why, in fact, the Eleventh Circuit's holding was not *compelled* by this Court's decisions (Pet. at 28 n.49).

At the end of the day, petitioners are absolutely clear (and correct) in acknowledging that the claims here are "fact-specific." Pet. at 28 n.49. They contend, at most, that they – *i.e.*, these specific litigants – are entitled to the relief they seek "on the present record." Pet. at 24; *accord id.* at i ("Under the conditions currently prevailing in the Alabama postconviction process ...."). As a rule, of course, such a fact-bound request for what can only be understood as pure error-correction is an insufficient basis for certiorari. *See* Sup. Ct. R. 10. It is true, of course, that review might be warranted if there truly were some grave unfairness lurking. And by asserting that "death-row prisoners in Alabama *have* 'been unable to obtain counsel to represent ... [them] in postconviction proceedings" (Pet. at 4) and, indeed, that those same inmates are currently "unable to obtain postconviction representation" (Pet. at 29), petitioners are clearly attempting to frame this as a grave-unfairness case. But as we have shown, petitioners' suggestion that there are scores of "unrepresented condemned inmates" in Alabama is utterly and completely false.

There is no basis for certiorari here. The petition should be denied.[17]

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[17] This Court recently denied certiorari in *Arthur v. Allen*, 549 U.S. __ (No. 06-954) (April 16, 2007), which presented (among others) the same fundamental access-to-courts question that petitioners present here. *See, e.g.*, Pet. at 19 ("The State of Alabama failed to provide Mr. Arthur with any legal assistance or counsel to prepare an initial post-conviction petition.").

I. The Petition Should Be Denied Because The Eleventh Circuit's Decision Is Consistent With – And, Indeed, Was Dictated By – This Court's Precedents.

Because they cannot and do not assert that the Eleventh Circuit's decision here conflicts with the decision of any other appellate court or presents a question of national importance, petitioners are left to argue that the decision below is simply wrong. It is not. In fact, as the Eleventh Circuit recognized, its decision follows straightaway from three decades' worth of this Court's own precedent. *See, e.g.*, Pet. App. A-7 ("[W]e are ... bound by United States Supreme Court precedent, which precludes us from granting the inmates the relief they seek."). There is no basis for disturbing that decision.

A. Certiorari Should Be Denied As To Question No. 1 Because Petitioners Have Offered No Compelling Basis For Overruling *Murray v. Giarratano* And Its Progeny.

With respect to Question No. 1, petitioners concede that this Court's decision in *Murray v. Giarratano*, 492 U.S. 1 (1989), "explicitly rejected the contentions that death-sentenced inmates have a right to state-provided counsel by force of the Sixth or Eighth Amendments, Due Process in its fundamental-fairness aspect, or Equal Protection." Pet. at 23. Chief Justice Rehnquist's plurality opinion so concluded, and Justice Kennedy's concurring opinion "did not take issue with those rulings." *Id.* Petitioners nonetheless ask this Court to "reconsider[]" *Giarratano* – and, by implication the several subsequent decisions that have reaffirmed it – because, they say, the Sixth, Eighth, and Fourteenth Amendments "evolve as times change" and because "much has changed since *Giarratano* was decided in 1989." Pet. at 25.

There is no basis for walking away from *Giarratano* and its progeny. Petitioners have not even attempted to show, for instance, that the *Giarratano*'s right-to-counsel-as-such

holding[18] has "proven to be intolerable simply in defying practical workability" or that "related principles of law have so far developed as to have left the [*Giarratano*] rule no more than a remnant of abandoned doctrine." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992). Petitioners offer a summary argument about changed circumstances, pointing (vaguely) to what they believe to be increasingly stringent rules governing post-conviction practice. *See* Pet. at 25-26, 30-31. But their brief contention in that respect does not come close to demonstrating that the relevant "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855.

Even aside from *stare decisis* considerations, there are good reasons to reject petitioners' invitation to overrule *Giarratano*'s right-to-counsel-as-such holding. First, as we explain more fully in discussing petitioners' "access" argument below (*see infra* at 27-35), there is a lot more to this area of the law than just *Giarratano*. *Giarratano*'s holding that there is no right to counsel under the Sixth or Eighth Amendments or under the Fourteenth Amendment's Due Process Clause rested squarely on this Court's earlier decisions in *Ross v. Moffitt*, 417 U.S. 600 (1974), and *Pennsylvania v. Finley*, 481 U.S. 551 (1987). And in the years since *Giarratano*, this Court has repeatedly reaffirmed its right-to-counsel holding. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 755 (1991) ("*Finley* and *Giarratano* established that there is no right to counsel in state collateral proceedings."); *McCleskey v. Zant*, 499 U.S. 467, 495 (1991) ("'[T]he right to appointed counsel extends to the first appeal of right, and no further.'" (quoting *Finley*,

[18] To be clear, petitioners make two claims: first, that they are constitutionally entitled to taxpayer-funded post-conviction counsel as such (Question No. 1); and second, that they are constitutionally entitled to taxpayer-funded post-conviction counsel as an adjunct to the right of access to the courts (Question No. 2).

481 U.S. at 555)). Indeed, as petitioners acknowledge, this Court earlier *this Term* reiterated – pointing to *Coleman* (which had itself relied on *Giarratano*) using an "*e.g.*" cite – that "prisoners have no constitutional right to counsel" in "the postconviction context." *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007). That most recent reaffirmation, it goes without saying, post-dates all of the supposed "changes" to post-conviction practice (Pet. at 25) that petitioners posit.

Second, petitioners' effort to stretch the Sixth Amendment (whether alone or in concert with the Eighth and Fourteenth Amendments) to guarantee a right to taxpayer-funded post-conviction counsel is, as the Eleventh Circuit correctly recognized (Pet. App. A-10), simply unsustainable as a matter of constitutional text. The Sixth Amendment's language unambiguously provides that an "accused" shall have the right to the assistance of counsel "[i]n all criminal prosecutions." U.S. Const. amend. VI. No amount of massaging can make the term "criminal prosecution[]" extend beyond trial (and beyond even direct appeal) to include post-conviction proceedings, which have been held, both by this Court and by the Alabama courts, to be "civil in nature." *E.g.*, *Finley*, 481 U.S. at 557; *Hamm v. State*, 913 So. 2d 460, 471 (Ala. Crim. App. 2002); *accord* Pet. App. A-10 (Eleventh Circuit) (citing *Bourdon v. Loughren*, 386 F.3d 88, 96 (2d Cir. 2004), and *Williams v. Lockhart*, 849 F.2d 1134, 1139 (8th Cir. 1988), as rejecting application of the Sixth Amendment in post-conviction proceedings).

Petitioners have offered no convincing reason whatsoever for this Court to overrule *Giarratano*'s right-to-counsel-as-such holding.

B. Certiorari Should Be Denied As To Question No. 2 Because Petitioners Have Offered No Compelling Reason For Jettisoning 30 Years' Worth Of Access-To-Courts Jurisprudence.

With respect to their right-to-counsel-as-an-adjunct-to-the-right-of-access claim, petitioners in the Eleventh Circuit focused all their energies on attempting to marginalize and

distinguish *Murray v. Giarratano*, 492 U.S. 1, in which this Court rejected Virginia death-row inmates' claim (in all material respects identical to petitioners' claim here) that they were constitutionally entitled to taxpayer-funded post-conviction counsel. In response, the State pointed out that "there is much more to this area of the law than just *Giarratano*" and that "[t]he broader context," which petitioners had "conspicuously ignore[d], fatally undermine[d] their position." C.A. Red Br. 12. In its decision, the Eleventh Circuit, too, faulted petitioners for "ignor[ing] the significance of pre-*Giarratano* and post-*Giarratano* cases" – chiefly, *Ross v. Moffitt*, 417 U.S. 600, *Pennsylvania v. Finley*, 481 U.S. 551, *McCleskey v. Zant*, 499 U.S. 467, and *Coleman v. Thompson*, 501 U.S. 722. *See* Pet. App. A-8. Nonetheless, in this Court, petitioners once again spend all their time talking about – and struggling to distinguish – *Giarratano*, and stand mute (or nearly so) concerning the balance of the case law.

In the pages that follow, we will first provide a systematic account of the governing precedent and then rebut petitioners' specific critiques of the Eleventh Circuit's opinion.

1. *Ross v. Moffitt*. The relevant line begins with *Ross v. Moffitt*, 417 U.S. 600 (1974). There, this Court faced an argument that state inmates are constitutionally entitled to the assistance of counsel to pursue discretionary appeals on direct review in state court. The Court acknowledged its earlier decision in *Douglas v. California*, 372 U.S. 353 (1963), that state prisoners have a right to counsel on their first appeal of right, but expressly refused to "extend" that decision even to the discretionary-review phase of direct appeal. *Ross*, 417 U.S. at 607. In so holding, the *Ross* Court made two observations that spell trouble for petitioners' claim here. First, the Court emphasized the "significant differences between the trial and appellate stages of a criminal proceeding." *Id.* at 610. Whereas at trial, the State initiates legal process against a presumptively innocent defendant and seeks to prove him guilty, on appeal just the reverse is

true; the defendant, having been found guilty beyond a reasonable doubt, initiates process to overturn that finding. *Id.* at 610-11. In the light of those important practical distinctions – and the fact that under the Constitution "the State need not provide any appeal at all" – the Court found that the State does not "act[] unfairly by refusing to provide counsel to indigent defendants at every stage of the way." *Id.* at 611. The *Ross* Court's observations apply *a fortiori* to post-conviction proceedings. Not only is the post-conviction petitioner, rather than the State, the one initiating proceedings, but on collateral review he is attempting to overcome not just a jury's verdict of guilt but also the affirmance of that verdict on direct appeal.

Second, in holding that there is no denial of "access" simply "because the State does not appoint counsel to aid [inmates] in seeking review" in a state supreme court, the *Ross* Court emphasized that an inmate seeking discretionary review "will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case." *Id.* at 615. This observation, too, holds true in the post-conviction phase. "These materials, supplemented by whatever submission [an inmate] may make *pro se*," should give the post-conviction court "an adequate basis" for granting or denying relief. *Id.*

2. *Bounds v. Smith.* This Court confirmed in *Bounds v. Smith*, 430 U.S. 817 (1977), that inmates have a right of "meaningful access" to the courts for the purpose of presenting post-conviction petitions. The Court, however, expressly declined to specify the means by which States must ensure that right; rather, it left the issue of implementation to the legislative process. And importantly here, the Court twice emphasized that it was *not* suggesting that States are constitutionally obliged to provide post-conviction petitioners with taxpayer-funded lawyers: first, in observing that States could discharge constitutional obligations by providing *either*

adequate law libraries *or* "adequate assistance from persons trained in the law," *id.* at 828; and second, in compiling an illustrative list of "alternative means" for ensuring court access – some of which involved lawyers, others of which did not – and stressing that "a legal access program need not include any particular element we have discussed ...." *Id.* at 831-32. (Notably, one of the options expressly approved by the *Bounds* Court was "the organization of volunteer attorneys through bar associations or other groups." *Id.* at 831. As we have shown, that is *precisely* how most of the Alabama inmates whom petitioners call "unrepresented" are, in fact very well represented. *See supra* at 8-14.)

3. *Pennsylvania v. Finley.* In *Pennsylvania v. Finley*, 481 U.S. 551 (1987), this Court addressed the very question that the petition here presents and held, emphatically, that there is no constitutional right to the assistance of post-conviction counsel (either as such or as an adjunct to the right of access). The Court stressed that it had "never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions" and expressly "decline[d] to so hold" in the case before it. *Id.* at 555. To the contrary, the Court held that its cases "establish that the right to appointed counsel extends to the first appeal of right, *and no further*." *Id.* (emphasis added). Building on *Ross*, the *Finley* Court concluded as follows: "[S]ince a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process." *Id.*

The Court found that the considerations that had animated its decision in *Ross* – among them, that a presumptively-innocent defendant's need for an attorney "'as a shield'" is categorically different from a convict's desire for a lawyer to act "'as a sword to upset the prior determination of guilt'" – "apply with even more force to postconviction review" than to

discretionary appeals on direct review. *Id.* at 555-56 (quoting *Ross*, 417 U.S. at 610-11). The reason is commonsensical: "Postconviction relief is even further removed from the criminal trial than is discretionary direct review" and, indeed, is not even "part of the criminal proceeding itself, and ... is in fact considered to be civil in nature." *Id.* at 556-57. Post-conviction review, the Court emphasized, "is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction." *Id.* at 557. States, the Court continued, need not provide post-conviction review at all, and "when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well." *Id.* Finally, the Court reiterated *Ross*' rejection of the access claim on the ground that a "defendant's access to the trial record and appellate briefs and opinions provided sufficient tools for the *pro se* litigant to gain meaningful access to courts that possess a discretionary power of review" and held that "the same conclusion necessarily obtains with respect to postconviction review," which, again, is even further removed from the trial process. *Id.*

4. *Murray v. Giarratano*. In *Murray v. Giarratano*, 492 U.S. 1 (1989), the plurality[19] began by summarizing the Court's holding in *Finley*: "[N]either the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of 'meaningful access' require[s] the State to appoint counsel for indigent prisoners seeking state postconviction relief." *Id.* at 7. The plurality then clarified (not that the Court's broadly-worded opinion in *Finley* had left any room for doubt) that "the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases." *Id.* at 10. In so concluding, the plurality acknowledged that the Constitution imposes some "special constraints on the procedures used to convict an accused of a

[19] Justice Kennedy concurred in the judgment. Concerning petitioners' effort to distinguish this case on the basis of Justice Kennedy's concurrence, see *infra* at 35.

capital offense and sentence him to death." *Id.* at 8. But, the plurality emphasized (in a portion of its opinion with which petitioners acknowledge Justice Kennedy expressed no disagreement, *see* Pet. at 23), those "special constraints" apply only at "the trial stage of capital offense adjudication"; they do not extend to the appellate or post-conviction phases. *Id.* at 9. Because "[s]tate collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal," the *Giarratano* plurality "decline[d] to read either the Eighth Amendment or the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases." *Id.* at 10.

5. *McCleskey v. Zant*. Seizing on the fact that *Giarratano* was a plurality decision, and that Justice Kennedy concurred separately in the judgment there, petitioners assert that this Court's precedent leaves open the question of *Finley*'s application in the capital context. They are wrong. Only two years after *Giarratano*, the Supreme Court decided *McCleskey v. Zant*, 499 U.S. 467 (1991). In that death-penalty case, the Court – in an opinion *authored* by Justice Kennedy – went out of its way to clarify that the cause-and-prejudice analysis that it was adopting to implement the "abuse of the writ" doctrine did *not* "imply that there is a constitutional right to counsel in federal habeas corpus." *Id.* at 495. To the contrary, Justice Kennedy emphasized for the Court, "'the right to appointed counsel extends to the first appeal as of right, and no further.'" *Id.* (quoting *Finley*, 481 U.S. at 555).

6. *Coleman v. Thompson*. Just a month later, this Court decided *Coleman v. Thompson*, 501 U.S. 722 (1991). In that capital case, the Court, in an opinion authored by Justice O'Connor and joined in full by Justice Kennedy, reiterated in no uncertain terms that "*Finley* and *Giarratano* established that there is no right to counsel in state collateral proceedings." *Id.* at

755. *McCleskey* and *Coleman* are particularly significant because, as the Eleventh Circuit emphasized, the petitioners there "were both death-sentenced inmates; thus, there is no question that the rule of *Finley*" – with or without *Giarratano* – "applies equally to death-sentenced inmates." Pet. App. A-8.[20]

7. *Lawrence v. Florida.* Only several months ago, this Court held that a lawyer's miscalculation was no basis for equitably tolling AEDPA's statute of limitations – "particularly," the Court emphasized, "in the postconviction context where prisoners have no right to counsel." *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007) (citing *Coleman*, 501 U.S. at 756-57).

* * *

In the teeth of this mass of authority, petitioners offer three critiques of the Eleventh Circuit's opinion. First, petitioners complain that the Eleventh Circuit erroneously elevated the *Giarratano* plurality opinion (concerning the right to counsel as an adjunct of the right of access) to a Court holding. *See* Pet. at 27-28. But that critique is, at most, one of style only, not of substance, for the following reason: The Eleventh Circuit made absolutely clear that its judgment rested not on *Giarratano* alone (however the decision there is properly characterized) but also on the decisions of this Court that led to and followed *Giarratano*. Indeed, the Eleventh Circuit went a step further and stated, in express terms, that its decision would be the same without *Giarratano* in the mix at all: "[E]ven assuming that *Giarratano* is inapplicable to their claims, the inmates ignore the significance of pre-*Giarratano* and post-*Giarratano* cases." Pet.

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[20] *Coleman* left open the possibility that there might be "an exception to the rule of *Finley* and *Giarratano* in those cases where collateral review is the first place a prisoner can present a challenge to his conviction." 501 U.S. at 755. Every court of appeals to consider the question has rejected that exception. *See Martinez v. Johnson*, 255 F.3d 229, 241 (5th Cir. 2001); *Mackall v. Angelone*, 131 F.3d 442 (4th Cir. 1997); *Hill v. Jones*, 81 F.3d 1015, 1026 (11th Cir. 1996); *Bonin v. Calderon*, 77 F.3d 1155 (9th Cir. 1996); *Nolan v. Armontrout*, 973 F.2d 615, 616-17 (8th Cir. 1992).

App. A-8. Specifically, the Eleventh Circuit pointed to *Ross*, *Finley*, *McCleskey*, and *Coleman*, and held that because "[t]he *McCleskey* and *Coleman* petitioners were both death-sentenced inmates," there "is no question that the rule of *Finley*" – *i.e.*, no right to post-conviction counsel as an adjunct to the right of access – "applies equally to death-sentenced inmates." *Id.*

Petitioners' only response to that central theme of the Eleventh Circuit's decision appears in an extended footnote discussion. *See* Pet. at 28-29 n.49. There, petitioners contend (in critique number two) that neither *Ross*, *Finley*, *McCleskey*, nor *Coleman* addressed the sort of "fact-specific" right-of-access claim at issue here. But that is just not true, as the discussion above amply demonstrates. In *Ross*, for instance, this Court expressly held that "[w]e do not believe that it can be said ... that a *defendant in respondent's circumstances* is denied *meaningful access* to the North Carolina Supreme Court" by virtue of the State's failure to appoint counsel on discretionary review. 417 U.S. at 615 (emphasis added). So, too, in *Finley*, this Court squarely rejected the respondent's "meaningful access" claim. *See* 481 U.S. at 557.

Petitioners' footnote argument here is reminiscent of their attempt in the Eleventh Circuit to distinguish this Court's decisions. There, they tried to divide and conquer the governing case law by asserting that (1) whereas *Ross* and *Finley* were "access" cases, they were not capital cases; and (2) whereas *McCleskey* and *Coleman* were capital cases, they were not (at least in so many words) "access" cases. *See* C.A. Gray Br. 4-5. As the State explained in response, this Court's decisions are not so easily compartmentalized, as even a cursory review of *Coleman* makes clear. There, in deciding a capital case, this Court relied expressly on *Ross*, *Finley*, and *Giarratano* – all access cases – in again "declin[ing] to extend the right to counsel," however packaged, "beyond the first appeal of a criminal conviction" and, indeed, recognized that "*Finley* and *Giarratano*" – again, both access cases – "established that there is no right to counsel in state

collateral proceedings." *Coleman*, 501 U.S. 755-56. *Accord McCleskey*, 499 U.S. at 495 (quoting *Finley*, an access case, for the proposition that "the right to appointed counsel extends to the first appeal as of right, and no further"). The point is simply that all of these decisions – from *Ross* to *Finley* to *Giarratano* to *McCleskey* to *Coleman*, and now to *Lawrence* – are part of a single, unified body of constitutional jurisprudence that is fundamentally opposed to petitioners' position.

Finally, assuming that they're right that none of this Court's pre- or post-*Giarratano* decisions counts for anything, petitioners argue (Pet. at 29) that the Eleventh Circuit's decision is inconsistent with Justice Kennedy's concurring opinion in *Giarratano* and, in particular, his observation there that "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings ...." 492 U.S. at 14-15 (Kennedy, J., concurring in the judgment). But even that argument misses the mark, for reasons we have already explained in detail. In an effort to distinguish *Giarratano*, petitioners assert that "the Court of Appeals below acknowledged" that "Alabama's condemned inmates are unable to obtain postconviction representation." Pet. at 29. As explained above (*see supra* at 6), as support for that assertion, petitioners (mis)quote the Eleventh Circuit's observation that petitioners had "cite[d] cases in which [unrepresented] death-sentenced inmates' post-conviction petitions were dismissed on procedural or limitations grounds as proof of actual injury." *Id.* (quoting Pet. App. A-5). As we have shown, the bracketed word "unrepresented" is petitioner's own insertion, *not* the Eleventh Circuit's; the court's opinion *says no such thing*. And, indeed, the record here (which we have extensively described, *see supra* at 8-16) demonstrates conclusively that Alabama death-row inmates, like the Virginia inmates at issue in *Giarratano*, are, in fact, well-represented in post-conviction proceedings. That fact, which petitioners stubbornly ignore (to the point of blatantly

and systematically misrepresenting the record), essentially erases any perceived distinction between *Giarratano* and this case.

C. Certiorari Should Be Denied As To Question No. 3 Because Petitioners Have Never Specified Any Sort Of "Other Assistance" To Which They Think They Might Be Entitled.

In a short three paragraphs, petitioners contend that the Eleventh Circuit was wrong to deny them relief on their nebulous "some lesser form of legal assistance" claim. Pet. at 33-34. The argument is an afterthought here, just as it has been throughout the course of the litigation. The problem is that petitioners have never provided any concrete hint as to what "lesser form of legal assistance" they have in mind. Petitioners' current assertion that "[t]he nature of this claim has been clear from the outset of the litigation" (Pet. at 33) is, with respect, simply false.

Petitioners' complaint is essentially silent on the issue of non-attorney legal assistance. *See* Doc. 1. Petitioners first floated the other-assistance idea in a brief to the district court, in which they asked that court to "order the State to alter the system" as follows:

> [A] change in the procedural and factual requirements for postconviction; increase in the caps on compensation and alter the system of appointment of counsel in postconviction; and/or set up a system for facilitating factual development and legal assistance that meets the constitutional requirement of meaningful access.

Doc. 82, p.51.

Perhaps realizing that their specific suggestions were of the "wildly intrusive" variety this Court has condemned, *Lewis v. Casey*, 518 U.S. 343, 362 (1996), petitioners abandoned them on appeal. But they never offered anything by way of substitution. Instead, in the Eleventh Circuit, petitioners only referred alternatively – and cryptically – to "some lesser form of legal assistance," "some measure of legal assistance short of the appointment of counsel," and some "other form[] of legal assistance (short of attorneys)." C.A. Blue Br. 1, 11, 45. The Eleventh Circuit found that in order to determine "whether the lack of this 'lesser form of legal assistance'

denied the inmates meaningful access to the courts," it needed to know the sort of "lesser form of legal assistance" to which the inmates "claim they are entitled." Pet. App. A-9. Confronted with only silence on that score, the Eleventh Circuit found that it had no choice but to reject petitioners' other-assistance claim. *See id.*

In an effort to remedy the defect that led the lower courts to reject their claim, petitioners in this Court try to add some meat to the other-assistance claim's bones. But their effort is too little, too late. It is too little because, even now, the request is simply for "some form of legal assistance, albeit less than individual representation by counsel" or, alternatively, for "some lesser form of legal assistance." Pet. at i, 33. At its *most* specific, petitioners frame the claim as follows: "'[I]f not a lawyer, *at least give us something*' – like, for example," a prison law office, a resource center, or "some qualified paralegals." Pet. at 33 (emphasis added). The current effort is too late, as well, because the little bit of detail petitioners offer here was not (as the Eleventh Circuit's opinion makes clear) offered in any sustained way to the lower courts.

In essence, what petitioners are asking is for a court to require the State to bid against itself. If the State were to offer, for instance, "some qualified paralegals" (Pet. at 33), petitioners would no doubt find some basis to contend that that was not good enough. And so on and so on. The State has been down that road before. *Cf.* Brief of State of Alabama, *et al.*, as Amici Curiae, at 4-18, *Hill v. McDonough*, 126 S. Ct. 2096 (2006) (No. 05-8794) (recounting how the State of Alabama continues to this day to litigate David Larry Nelson's §1983 venous-access claim, *see Nelson v. Campbell*, 541 U.S. 637 (2004), and how, despite Nelson's counsel's repeated assurances to this Court that he was challenging *only* the use of a "cut down" procedure, he amended his complaint on remand to challenge the very central-line procedure that he himself had offered as a constitutional alternative). Petitioners here gave the Eleventh Circuit no basis

for granting relief on their other-assistance claim, and have given this Court no basis for unsettling the Eleventh Circuit's refusal to do so.

II. The Petition Should Be Denied Because This Case Provides A Uniquely Poor Vehicle For Considering The Questions Presented.

Setting aside the correctness of the Eleventh Circuit's decision, certiorari should be denied because this case presents an exceedingly poor vehicle for addressing the questions presented. For three reasons, the questions that petitioners ask this Court to consider (or reconsider, as the case may be) are not cleanly presented on this record.

A. This Case Is A Poor Vehicle Because Petitioners' Entire Argument Is Founded Upon Misrepresentations Of The Evidentiary Record.

First, and most obviously, as we have shown at length and in detail, the factual premises that underlie petitioners' argument here – and, particularly, the suggestion that Alabama death-row inmates routinely go unrepresented in post-conviction proceedings – are categorically false. Petitioners' entire case here rests on fabricated quotations and unsupported assertions. There's just no other way to put it. The truth (detailed above) is that Alabama death-row inmates are overwhelmingly, if not uniformly, represented by superbly qualified, and typically well-financed, counsel in pursuing post-conviction relief.

B. This Case Is A Poor Vehicle Because Petitioners Lack Standing To Litigate Their Claims.

For two separate reasons, it is doubtful that the petitioners here even have standing to litigate the questions that their petition purports to present. First, and most fundamentally, it is clear that what petitioners principally want (under one theory or another, *see supra* note 18), is post-conviction counsel, and that, in standing jargon, the "actual injury" they claim is the absence of such counsel. But, again, as we have demonstrated in detail, petitioners *have in fact had* the very sort of post-conviction representation they now seek. Accordingly, there simply is

no Article III injury to be remedied here. (That is certainly true with respect to the named plaintiffs, all of whom filed counseled – or plainly ghost-written – Rule 32 petitions and were thereafter represented by qualified lawyers throughout post-conviction proceedings. *See supra* at 8-11. The failure of the named plaintiffs' standing defeats the standing of the entire class. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); *accord, e.g.*, *Lewis*, 518 U.S. at 357; *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 n.20 (1976); *Warth v. Seldin*, 422 U.S. 490, 502 (1975).)

Second, and separately, the district court found (Pet. App. A-52-53, A-55-56, A-58), and the State argued at length in the Eleventh Circuit (C.A. Red Br. 25-37), that petitioners had not demonstrated the standing/prejudice components of their access-to-courts claim as required under *Lewis v. Casey*, 518 U.S. 343, and *Christopher v. Harbury*, 536 U.S. 403 (2002). Specifically, the State contended (1) that petitioners, all of whom managed to file post-conviction petitions, had not shown either "actual injury" or the requisite causation under *Lewis* (C.A. Red Br. 27-33); and (2) that, in any event, petitioners had failed to plead "arguable," non-"protean" underlying substantive claims "in the[ir] complaint," as required by *Harbury*, *see* 536 U.S. at 415-16 (C.A. Red Br. 33-37).

The Eleventh Circuit agreed in part and disagreed in part with the State's *Lewis*-standing argument. *See* Pet. App. A-5 & n.3. With respect to *Harbury* standing, the Eleventh Circuit found that while "the complaint does provide some evidence of potentially arguable claims," it was "questionable whether the inmates provided sufficient detail to determine whether their underlying claims are 'arguable' and 'nonfrivolous.'" Pet. App. A-5. Although the Eleventh

Circuit went on to address the merits of petitioners' access claims, it clearly had reservations about petitioners' standing to litigate those claims. Were this Court to grant the petition to decide the access-to-courts issue, it would first have to untangle the standing knot that occupied a good deal of time, space, and energy in both courts below.

C. This Case Is A Poor Vehicle Because Even If There Were A Violation, There Is Clearly No Basis For Systemwide Relief.

This case, like *Lewis v. Casey*, was brought as a class action. The class complaint expressly seeks systemic relief. *See, e.g.*, Doc. 1, p.50-51 (prayer for relief). Accordingly, the question that this Court asked in *Lewis* pertains here, as well: Was any inadequacy here "widespread enough to justify systemwide relief?" 518 U.S. at 359. In *Lewis*, this Court held that even where it had been proven that two inmates had been denied meaningful access to the courts for the purpose of filing collateral and other challenges, those "two instances were a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief." *Id.* That same determination follows *a fortiori* here. Not even with respect to the only two inmates whom petitioners have highlighted here (*see supra* at 14-16) is there any basis for finding a constitutional violation. But even if we were to grant petitioners those two cases, their allegations would be, as in *Lewis*, "patently inadequate" to justify the systemic relief they seek.

CONCLUSION

In the event that the Court is interested in reconsidering or overruling *Ross*, *Finley*, *Giarratano*, *McCleskey*, *Coleman*, and/or *Lawrence*, it should await a better opportunity – namely, a case in which the complaining inmates clearly have standing to pursue the relief they seek and, perhaps more importantly, have not premised their entire challenge on gross misrepresentations of the record.

The petition should be denied.

Respectfully submitted,

Troy King
Attorney General

Kevin C. Newsom
Solicitor General

J. Clayton Crenshaw
Assistant Attorney General

State of Alabama
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130-0152
(334)353-9782

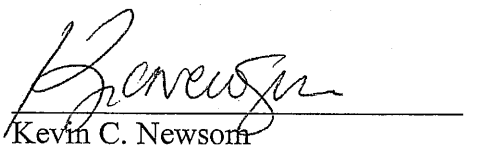
CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2007, a copy of the foregoing was served on the attorneys for the Petitioners by placing the same in the United States Mail, first class, postage prepaid, and addressed as follows:

Bryan A. Stevenson
Angela L. Setzer
Equal Justice Initiative of Alabama
122 Commerce Street
Montgomery, AL 36104

Stephen F. Hanlon
Holland & Knight LLP
2099 Pennsylvania Ave., N.W.
Suite 100
Washington, DC 20006

Laurie Webb Daniel
Holland & Knight LLP
1201 West Peachtree St., N.E.
One Atlantic Center, Suite 2000
Atlanta, GA 30309



Kevin C. Newsom
Solicitor General
Counsel of Record

State of Alabama
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130
(334) 353-9782

ADDENDUM

APPENDIX TO RULE 32

Form for Use in State Court for Petitions
for Relief from Conviction or Sentence
Imposed in State Court
(Rule 32, Alabama Rules of Criminal Procedure)

[This form is not to be used to challenge loss of good time deductions from sentence, changes in custody classification, or jail or prison conditions.]

READ THESE INSTRUCTIONS CAREFULLY BEFORE YOU BEGIN PREPARING THE PETITION

(1) This petition must be legibly handwritten or typewritten, and must be signed by the petitioner or petitioner's attorney under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered completely in the proper space on the form or on additional sheets submitted with the form. This form may be obtained from the librarian or other authorized officer of the corrections institution where you are confined.

(2) Additional pages are permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum and not as part of this form.

(3) Only the judgments entered in a single trial may be challenged in a particular petition. If you seek to challenge judgments entered in different trials, either in the same county or in different counties, you must file separate petitions.

(4) YOU MUST INCLUDE IN THIS PETITION ALL GROUNDS FOR RELIEF. FAILURE TO INCLUDE A GROUND FOR RELIEF IN THIS PETITION MAY RESULT IN YOUR BEING BARRED FROM PRESENTING IT IN A FUTURE PETITION.

(5) YOU MUST INCLUDE ALL FACTS SUPPORTING EACH GROUND FOR RELIEF AND YOU MUST BE AS SPECIFIC AS POSSIBLE AS TO THE FACTS.

(6) Upon receipt of the appropriate fee, your petition will be filed if it is in proper order. If you do not know the amount of the fee, ask the librarian or other authorized officer of the corrections institution where you are confined to give you this information.

(7) If you do not have the necessary fee, you may request permission to proceed in forma pauperis, in which event you must complete the declaration at the end of this form, setting forth information establishing your inability to pay the fees and costs or give security therefor. Your declaration must include financial information relating to the twelve (12) months preceding the filing of this petition.

If you wish to proceed in forma pauperis, you must have an authorized officer at the corrections institution where you are confined complete the certificate at the end of your in forma pauperis declaration as to the amount of money and securities on deposit to your credit in any account in the institution.

(8) Complete all applicable items in the petition. When the petition is fully completed, the ORIGINAL AND TWO (2) COPIES must be mailed to the Clerk of the Court in which you were convicted.

(9) You must comply with these instructions in order to have your petition promptly considered.

Case number
___ ID YR NUMBER
(To be Completed by Court Clerk)

PETITION FOR RELIEF FROM CONVICTION OR SENTENCE

(Pursuant to Rule 32,
Alabama Rules of Criminal Procedure)

IN THE _____ COURT OF _____, ALABAMA

_____ v. _____

Petitioner (Full Name)

Respondent
[Indicate either the "State" or, if filed in municipal court, the name of the "Municipality"]

Prison Number _____ Place of Confinement _____

County of Conviction _____

NOTICE: BEFORE COMPLETING THIS FORM, READ CAREFULLY THE ACCOMPANYING INSTRUCTIONS.

1. Name and location (city and county) of court which entered the judgment of conviction or sentence under attack _____

_____

2. Date of judgment of conviction _____

3. Length of sentence _____

4. Nature of offense involved (all counts) _____

_____

_____

_____

5. What was your plea? (Check one)
   (a) Guilty_____
   (b) Not Guilty_____
   (c) Not Guilty by reason of mental disease or defect_____
   (d) Not Guilty and not guilty by reason of mental disease or defect _____

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   _____

   _____

   _____

6. Kind of trial: (Check one)

(a) Jury___ (b) Judge only___

7. Did you testify at the trial?

Yes ___ No ___

8. Did you appeal from the judgment of conviction?

Yes ___ No ___

9. If you did appeal, answer the following:

(a) As to the state court to which you first appealed, give the following information:

(1) Name of court _____

(2) Result _____

(3) Date of result _____

(b) If you appealed to any other court, then as to the second court to which you appealed, give the following information:

(1) Name of court _____

(2) Result _____

(3) Date of result _____

(c) If you appealed to any other court, then as to the third court to which you appealed, give the following information:

(1) Name of court _____

(2) Result _____

(3) Date of result _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes___ No___

11. If your answer to Question 10 was "yes," then give the following information in regard to the first such petition, application, or motion you filed:

(a) (1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(attach additional sheets if necessary)

(4) Did you receive an evidentiary hearing on your petition, ap-

plication, or motion?
Yes ___ No ___

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application, or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(attach additional sheets if necessary)

(4) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes ___ No ___

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application, or motion, give the same information (attach additional sheets giving the same information for any subsequent petitions, applications, or motions):

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(attach additional sheets if necessary)

(4) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes ___ No ___

(5) Result _____

(6) Date of result _____

(d) Did you appeal to any appellate court the result of the action taken on any petition, application, or motion?

(1) First petition, etc. Yes ___ No ___

(2) Second petition, etc. Yes ___ No ___

(3) Third petition, etc. Yes ___ No ___

ATTACH ADDITIONAL SHEETS GIVING THE SAME INFORMATION FOR ANY SUBSEQUENT PETITIONS, APPLICATIONS, OR MOTIONS.

(e) If you did not appeal when you lost on any petition, application, or motion, explain briefly why you did not:

_____

_____

_____

12. Specify every ground on which you claim that you are being held unlawfully, by placing a check mark on the appropriate line(s) below and providing the required information. Include all facts. If necessary, you may attach pages stating additional grounds and the facts supporting them.

GROUNDS OF PETITION

Listed below are the possible grounds for relief under Rule 32. Check the ground(s) that apply in your case, and follow the instruction under the ground(s):

_____ A. The Constitution of the United States or of the State of Alabama requires a new trial, a new sentence proceeding, or other relief. For your information, the following is a list of the most frequently raised claims of constitutional violation:

(1) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(2) Conviction obtained by use of coerced confession.

(3) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(4) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(5) Conviction obtained by a violation of the privilege against self-incrimination.

(6) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(7) Conviction obtained by a violation of the protection against double jeopardy.

(8) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(9) Denial of effective assistance of counsel.

This list is not a complete listing of all possible constitutional violations.

If you checked this ground of relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each constitutional violation that you claim, whether or not it is one of the nine listed above, and include under it each and every fact you feel supports this claim. Be specific and give details.

_____ B. The court was without jurisdiction to render the judgment or to impose the sentence.

If you checked this ground of relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

_____ C. The sentence imposed exceeds the maximum authorized by law, or is otherwise not authorized by law.

If you checked this ground of relief, attach a separate sheet of paper

with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

_____ D. Petitioner is being held in custody after his sentence has expired.

If you checked this ground of relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

_____ E. Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:

The facts relied upon were not known by petitioner or petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding, and could not have been discovered by any of those times through the exercise of reasonable diligence; and

The facts are not merely cumulative to other facts that were known; and

The facts do not merely amount to impeachment evidence; and

If the facts had been known at the time of trial or sentencing, the result would probably have been different; and

The facts establish that petitioner is innocent of the crime for which he was convicted or should not have received the sentence that he did.

If you checked this ground of relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

_____ F. The petitioner failed to appeal within the prescribed time and that failure was without fault on petitioner's part.

If you checked this ground of relief, attach a separate sheet of paper with this ground listed at the top of the page. On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

13. IMPORTANT NOTICE REGARDING ADDITIONAL PETITIONS. RULE 32.2(b) LIMITS YOU TO ONLY ONE PETITION IN MOST CIRCUMSTANCES. IT PROVIDES:

"Successive Petitions. The court shall not grant relief on a second or successive petition on the same or similar grounds on behalf of the same petitioner. A second or successive petition on different grounds shall be denied unless the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice."

A. Other than an appeal to the Alabama Court of Criminal Appeals or the Alabama Supreme Court, have you filed in state court any petition attacking this conviction or sentence?

Yes___ No___

B. If you checked "Yes," give the following information as to earlier petition attacking this conviction or sentence:

(a) Name of court _____

(b) Result _____

(c) Date of result _____
(attach additional sheets if necessary)

C. If you checked the "Yes" line in 13A, above, and this petition contains a different ground or grounds of relief from an earlier petition or petitions you filed, attach a separate sheet or sheets labelled: "EXPLANATION FOR NEW GROUND(S) OF RELIEF."

On the separate sheet(s) explain why "good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and [why the] failure to entertain [this] petition will result in a miscarriage of justice."

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes__ No__

15. Give the name and address, if known, of each attorney who represented you at the following stages of the case that resulted in the judgment under attack:

(a) At preliminary hearing _____
_____

(b) At arraignment and plea _____
_____

(c) At trial _____
_____

(d) At sentencing _____
_____

(e) On appeal _____
_____

(f) In any post-conviction proceeding _____
_____

(g) On appeal from adverse ruling in a post-conviction proceeding _____
_____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes __ No __

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes __ No __

(a) If so, give name and location of court which imposed sentence to be served in the future: _____
_____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes__ No__

18. What date is this petition being mailed?

_____

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

PETITIONER'S VERIFICATION UNDER OATH
SUBJECT TO PENALTY FOR PERJURY

I swear (or affirm) under penalty of perjury that the foregoing is true and correct. Executed on _____.
(Date)

_____
Signature of Petitioner

SWORN TO AND SUBSCRIBED before me this the _____ day of _____, 19_____.

_____
Notary Public

OR*

ATTORNEY'S VERIFICATION UNDER OATH
SUBJECT TO PENALTY FOR PERJURY

I swear (or affirm) under penalty of perjury that, upon information and belief, the foregoing is true and correct. Executed on _____.
(Date)

_____
Signature of Petitioner's Attorney

SWORN TO AND SUBSCRIBED before me this the _____ day of _____, 19_____.

_____
Notary Public

Name and address of attorney representing petitioner in this proceeding (if any)

_____
_____
_____
_____

* If petitioner is represented by counsel, Rule 32.6 (a) permits either petitioner or counsel to verify the petition

CASE NUMBER

ID	YR	NUMBER

(To be completed by court clerk)

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

TROY KING
ATTORNEY GENERAL

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, AL 36130
(334) 242-7300
WWW.AGO.STATE.AL.US

May 10, 2007

Ms. Kathy Tycz
Supreme Court of the United States
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543-0001

Re: Barbour, et al. v. Allen, et al.; No. 06-10605

Dear Ms. Tycz:

The State hereby consents to the filing of amicus curiae briefs in support of the petition for a writ of certiorari.

Thank you for your assistance. Please contact me if you have any questions.

Sincerely,

Kevin C. Newsom
Solicitor General

KCN/mlj