No. 06-10605

IN THE

Supreme Court of the United States

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

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE CONSTITUTION PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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The Constitution Project respectfully submits this brief of amicus curiae in support of the petition for a writ of certiorari.[1]

INTEREST OF AMICUS

The Constitution Project is a non-profit organization that seeks solutions to contemporary constitutional issues through a combination of scholarship and public education. The Project's essential mission is to promote constitutional dialogue. To that end, it creates bipartisan blue-ribbon committees composed of former government officials, judges, scholars, and other prominent citizens to reach across ideological and partisan lines. The Project is committed to promoting a just balance between protecting the constitutional rights of criminal defendants and respecting the values of finality and federalism in the post-conviction process.

On February 1, 2006, the Constitution Project released the latest report of its Death Penalty Initiative, entitled *Mandatory Justice: The Death Penalty Revisited*, *available at* http://www.constitutionproject.org/pdf/MandatoryJustice Revisited.pdf (last visited May 10, 2007). That report advocates the provision of competent, adequately compensated lawyers to those charged with capital offenses at all stages of litigation, including state post-conviction proceedings. It also calls for adequate funding for experts and investigators in capital cases. The Project is firmly committed to these recommendations. But one need not even agree with these recommendations in order to perceive that Alabama is a unique outlier, in that it provides *no* legal assistance *of any kind* to capital defendants in preparing state post-conviction petitions. The Project thus urges the Court to grant certiorari and correct this anomaly.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this amicus brief have been submitted to the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the past several decades, this Court has overseen a dramatic restructuring of capital criminal procedure. Primary responsibility for correcting constitutional errors in capital cases has shifted from federal courts sitting in habeas back to state courts. This shift has at least the potential to produce efficient error-correction while, at the same time, promoting interests of federalism and repose.[2] As Alabama's treatment of capital defendants reveals, however, that project remains unfinished.

Post-conviction proceedings are often the first and only opportunity for prisoners to bring key federal claims, such as those based on the ineffective assistance of trial counsel, *Brady* violations, and juror misconduct. Those claims require the discovery and pleading of facts that are not contained in the trial or appellate record, and they also require a keen familiarity with state post-conviction procedure. In short, these are claims that no prisoner can bring effectively, if at all, without legal assistance. But the rights these claims seek to vindicate are fundamental to the integrity of our criminal justice system. Thus, now that States have assumed primary (and often exclusive) responsibility to hear and decide such post-conviction claims, they incur a related responsibility to provide legal assistance to death-sentenced prisoners who must navigate the byzantine complexities of state habeas proceedings.

Most States have sought to meet that responsibility. Indeed, every State that imposes the death penalty—save Alabama—recognizes the necessity of providing at least *some* legal assistance to death row inmates in filing state

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[2] The Constitution Project takes no position on the merits of this shift or on the death penalty itself. We represent a diverse group of people with a wide variety of views on the matter, including proponents and opponents of capital punishment. The Project does emphasize, however, the importance of counsel at all stages of a death penalty case, including state post-conviction proceedings, particularly now that the shift has taken place.

post-conviction petitions. Alabama *alone* fails to acknowledge the imperative necessity of legal assistance at this critical stage of capital criminal proceedings.

Alabama's failure to provide such post-conviction assistance to death row inmates, combined with a general scaling back of federal habeas remedies, leaves uncorrected too many potential errors in a context in which errors literally mean the difference between life and death. This is not the adequate system of error-correction that this Court has long sought to create and that Justice Kennedy attributed to Virginia in his *Giarratano* concurrence. The Court should grant certiorari and reverse the judgment below.

REASONS FOR GRANTING THE WRIT

I. CAPITAL CRIMINAL PROCEDURE HAS EVOLVED SUBSTANTIALLY OVER THE LAST SEVERAL DECADES

Over the past 50 years, this Court and Congress have presided over a seismic shift from one model of criminal procedure to another. The first, prevalent in the 1960s and 1970s, might be termed the "independent review" model.[3] Under this model, two separate tribunals—state and federal—successively and independently reviewed a petitioner's claims of constitutional error. The second tribunal, bringing to the table fresh sets of eyes and a different institutional perspective, discovered and resolved many errors that had gone uncorrected by the first post-conviction tribunal. But this Court and Congress have determined that this approach, despite its success at correcting errors, also imposed costs—not just the direct costs of successive, overlapping proceedings, but the indirect costs of diminished finality for state-court judgments.

Over the past few decades, this Court and Congress have also concluded that the costs of the independent-review model outweigh the benefits, and have thus embraced a sec-

[3] *See generally* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977) (discussing the model prevailing in the 1960s and the early transition away from that model).

ond model of criminal procedure. This might be called the "second main event" model, in that the criminal trial itself (and any direct appeals) are the first main event, and the state post-conviction proceeding is the second main event designed to correct any errors that remained after the first. Under this approach, any subsequent federal habeas review is significantly more deferential and limited than before, given the trust that the federal government has reposed in the States to correct errors themselves. To its advocates, the virtue of this approach lies in both the streamlining of the federal post-conviction review process and the greater level of respect shown the primary (state) tribunal.

To work as intended, however, this new model requires procedural safeguards to ensure effective error-correction in state post-conviction proceedings, particularly where the stakes are literally life and death. In this Section, we canvass, first, the central role that legal representation plays in ensuring criminal justice and, second, the shift to the second-main-event model for post-trial vindication of federal constitutional rights. Then, in Section II, we address how Alabama has failed utterly to satisfy the basic procedural norms underlying that new model.

A. The Centrality Of The Right To Legal Assistance

Of all constitutional rights designed to protect the integrity of the criminal justice system, none is more fundamental than the right to effective legal assistance. Indeed, "[t]he most important and the most obvious goal of criminal procedural due process is insuring the reliability of the guilt-determining process," and "[t]he master key to all the rules and procedures designed to achieve this objective is the right to counsel."[4] Thus, a key measure of whether the new

[4] Kamisar, *The Warren Court Criminal Justice Revolution: Reflections A Generation Later: How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, 3 Ohio St. J. Crim. L. 11, 22 (2005); *see also United States* v. *Cronic*, 466 U.S. 648, 654 (1984) (Stevens, J.) ("[O]f all the rights that an accused person has, the right to . . . counsel is by far the most pervasive for it affects his ability to assert any

model of capital criminal procedure can be trusted to produce legitimate outcomes must be whether death row inmates are provided adequate assistance of counsel. That is true not just at trial and on direct review, but also in post-conviction proceedings, where capital defendants are given their first and often only opportunity to raise certain types of claims, such as ineffective assistance of trial counsel, that cannot properly be raised on direct review.[5]

Starting with *Powell* v. *Alabama*, 287 U.S. 45 (1932), this Court recognized the importance of counsel in criminal proceedings as "fundamental" to due process. *Id.* at 68. The Court noted the grave dangers facing a defendant unschooled in the law:

> Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in

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other rights he may have.") (quoting Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956)).

[5] *See, e.g.*, *United States* v. *Agboola*, 417 F.3d 860, 864-865 (8th Cir. 2005) ("Generally, ineffective assistance of counsel claims are better left for post-conviction proceedings . . . because facts from outside the original record usually must be developed to decide such a claim.") (internal quotation marks and citations omitted); *United States* v. *Tobin*, 155 F.3d 636, 643 (3d Cir. 1998) ("[C]laims of ineffective assistance of counsel are ordinarily not cognizable on direct appeal. . . . The proper mechanism for challenging the efficacy of counsel is through a motion pursuant to 28 U.S.C. § 2255."); *United States* v. *Seymour*, 38 F.3d 261, 263 (6th Cir. 1994) (claims of ineffective assistance are more properly available in a post-conviction proceeding after the parties have had an opportunity to develop an adequate record); *see also* Meares, *Rewards For Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 Fordham L. Rev. 851, 909 (1995) ("[I]t must be noted that many, if not most, instances of *Brady*-type misconduct are discovered only after the trial is over. Proceedings involving *Brady*-type misconduct often are proceedings for post-conviction relief rather than direct appeals.").

> the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 68-69. Consistent with this recognition, in *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), this Court held that the assistance of counsel is so fundamental in criminal cases that counsel must be appointed for those federal criminal defendants who could not otherwise afford to retain them.

Early on, this Court noted the particular importance of providing counsel to indigent defendants in the death penalty context, making the right to counsel applicable to the States in capital cases in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961). Two years later, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), recognized that "lawyers in criminal courts are necessities, not luxuries," and applied a more general right to counsel in criminal cases to the States. The Court noted "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344. The Court extended this right to direct appeals in *Douglas* v. *California*, 372 U.S. 353, 353-358 (1963), and to the entering of guilty pleas in *White* v. *Maryland*, 373 U.S. 59 (1963). And the Court ultimately recognized as well that, to avoid becoming an empty promise, the right to counsel encompasses "the right to the *effective assistance* of counsel." *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added).[6]

During the same period, the Court recognized other due process protections that provide indigents the basic means

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[6] Long before deciding *McMann*, this Court noted in *Powell* that the right to be represented "is not discharged by an assignment (of counsel) at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Powell*, 287 U.S. at 69. The Court reiterated the importance of effective counsel to due process in *Reece* v. *Georgia*, 350 U.S. 85 (1955), before finally making the right and its Sixth Amendment basis explicit in *McMann*.

to put up a defense or appeal a conviction. *See Griffin* v. *Illinois*, 351 U.S. 12, 19 (1956) (indigent defendants must be furnished trial transcript); *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966) (making indigent appellant repay cost of transcript violates Equal Protection). And the Court added certain structural protections to ensure fair trials. *Pate* v. *Robinson*, 383 U.S. 375 (1966) (conviction of legally incompetent defendant violates due process); *Duncan* v. *Louisiana*, 391 U.S. 145, 147-158 (1968) (state criminal defendants guaranteed jury trials in all cases in which they would be entitled to a jury were they tried in federal court). The Court further established that the legitimacy of a conviction and sentence depends on more than simply what transpires before a trial judge. For example, the Court increasingly recognized that other actors in the criminal justice arena—including prosecutors[7] and police officers[8]—bear enforceable responsibilities to uphold the integrity of the criminal justice system.

B. The Shifting Roles Of State And Federal Courts In Post-Conviction Review

In addition to expanding the procedural safeguards intended to assure the reliability of outcomes of criminal proceedings, during the same period the Court also expanded its use of federal habeas jurisdiction to enforce the newly established due process protections. It is no coincidence that on the same day this Court decided *Gideon* and *Douglas*, it also announced a muscular federal habeas jurisprudence in the companion cases of *Townsend* v. *Sain*, 372 U.S. 293

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[7] *See Napue* v. *Illinois*, 360 U.S. 264, 265-272 (1959) (failure of prosecutor to correct testimony of witness which he knew to be false denied petitioner due process of law); *Brady* v. *Maryland*, 373 U.S. 83, 86-88 (1963) (suppression by prosecution of material evidence favorable to an accused who has requested it violates due process).

[8] *See Mapp* v. *Ohio*, 367 U.S. 643 (1961) ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by [the Fourth Amendment], inadmissible in a state court."); *Miranda* v. *Arizona*, 384 U.S. 436, 444-491 (1966) (procedural safeguards required prior to custodial interrogation).

(1963), and *Fay* v. *Noia*, 372 U.S. 391 (1963). *Townsend* held that federal courts in habeas may receive evidence and try facts. 372 U.S. at 310-312. At the same time, *Fay* announced a forgiving waiver rule, establishing that federal courts may grant relief on habeas despite an applicant's procedural failure to pursue a substantive right in the state forum. The Court introduced the "deliberate bypass" standard, which held that a claim is waived only

> [i]f a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures . . . .

Id. at 439. *Fay*'s adoption of the "deliberate bypass" standard marked the apex of the Court's embrace of the independent-review model.

By 1970, however, the tide was already beginning to turn against expansive use of federal habeas jurisdiction. In that year, this Court decided a trilogy of cases holding that a criminal defendant who had received competent counsel and entered a voluntary guilty plea thereby waived any claim that his confession had been coerced, even if the plea was entered to avoid a possible death penalty. *See Brady* v. *United States*, 397 U.S. 742 (1970); *McMann*, 397 U.S. 759; *Parker* v. *North Carolina*, 397 U.S. 790 (1970).

Later, the Court announced other rules that served to shift responsibility for enforcing certain procedural protections from the district courts in habeas to state courts. Chief among these was the Court's replacement of the liberal "deliberate bypass" standard from *Fay* with a "cause and prejudice" standard for assessing whether a petitioner had waived a federal claim. That is, the Court held that a petitioner who fails to raise a federal claim in state court must show both "cause" for the failure and actual prejudice in order to qualify for federal habeas relief. *See Francis* v. *Henderson*, 425 U.S. 536 (1976). In *Wainwright* v. *Sykes*, 433

U.S. 72 (1977), the Court held the "cause and prejudice" standard applicable to all petitioners seeking federal habeas relief on constitutional claims that were defaulted in state court. This Court went even further in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), holding that a district court on habeas may not consider a prisoner's constitutional claim absent a showing of cause and actual prejudice if the state court's denial of that claim rested on an independent and adequate procedural default rule.[9]

In decisions that continued the trend of transferring responsibility for error-correction back to the States, this Court held that district courts must dismiss habeas petitions containing both unexhausted and exhausted claims, *see Rose* v. *Lundy*, 455 U.S. 509, 513-520 (1982),[10] and imposed limits on successive petitions, *see McCleskey* v. *Zant*, 499 U.S. 467, 488-489 (1991). Other decisions further reduced the importance of federal habeas review. *See, e.g.*, *Teague* v. *Lane*, 489 U.S. 288, 300-310 (1989) (holding "new rule" of constitutional law not applicable to cases on collateral review); *Patton* v. *Yount*, 467 U.S. 1025, 1038-1040 (1984) (requiring deference to fact finding by state court judges); *Brecht* v. *Abrahamson*, 507 U.S. 619, 637-638 (1993) (habeas petitioner must demonstrate that any errors "had substantial and injurious effect or influence in determining the jury's verdict"). The import of these decisions was clear: state prisoners were to look primarily to state post-conviction proceedings to correct errors that occurred at trial and on direct appeal.

In 1996, Congress imposed its own additional, far-reaching reforms. At the same time that Congress elimi-

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[9] *Id.* at 750-751. In *Coleman*, the petitioner's counsel had filed his papers in state postconviction proceedings three days late. *See also Keeney* v. *Tamayo-Reyes*, 504 U.S. 1, 10 (1992) (extending cause and prejudice standard).

[10] Notably, however, this Court relaxed the harsh rule of *Rose* v. *Lundy* in 2005, recognizing that "the enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions." *Rhines* v. *Weber*, 544 U.S. 269 (2005).

nated federally-funded death penalty resource centers for the benefit of death row inmates,[11] it enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, which amended portions of 28 U.S.C. §§ 2254 and 2255, and, in one fell swoop, completed the remaining transition from the independent-review model to the second-main-event model of post-conviction review.

AEDPA "dramatically altered the landscape for federal habeas corpus petitions," *Rhines*, 544 U.S. at 274. The Act's major reforms included the institution of a one-year statute of limitations for state prisoners filing federal habeas petitions, leaving limited time for death row inmates to prepare those petitions.[12] In addition, the Act imposed strict exhaustion requirements on petitioners seeking review of state convictions and prohibited successive habeas petitions in most instances. 28 U.S.C. § 2244(b); *see* 28 U.S.C. § 2254(b)(1) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State.").

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[11] Howard, *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. Va. L. Rev. 863, 865 (1996); Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-1334 ("[N]one of the funds provided in this Act shall be available for Death Penalty Resource Centers or Post-Conviction Defender Organizations after April 1, 1996.").

[12] 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court."). That said, the time for filing is tolled when a prisoner files either a petition for certiorari or a petition for state post-conviction review. *See* 28 U.S.C. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.").

Among the Act's more consequential provisions are 28 U.S.C. §§ 2254(d)(1) and (e)(2).[13] Section 2254(d)(1) requires federal courts to defer to state-court conclusions of law and determinations of mixed questions of law and fact,[14] and Section 2254(e)(2) precludes federal courts from holding evidentiary hearings in habeas proceedings absent a showing that the claim relies on "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii). Finally, the Act placed conditions on the ability of petitioners to appeal decisions of the district court. *Id.* § 2253.

Congress was no doubt aware that many claims of constitutional error—such as ineffective assistance of counsel and *Brady* claims—can be properly raised *only* in post-conviction proceedings. And it is no secret that post-conviction proceedings are crucial to error correction in capital cases. "[S]tate and federal post-trial review has come to be an integral part of the modern American system of deciding who lives and who dies. . . . [I]t has fallen to state appellate and federal habeas judges to provide a crucial second stage of life-or-death screening." Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000).

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[13] *Brown* v. *Payton*, 544 U.S. 133, 148 (2005) (Breyer, J., concurring) ("In my view, this is a case in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference."); *see also Neal* v. *Puckett*, 286 F.3d 230, 244 (5th Cir. 2002) (en banc) (per curiam) (finding petitioner's claim of ineffective assistance of counsel meritorious, but that § 2254(d) precluded habeas corpus relief); *Sellan* v. *Kuhlman*, 261 F.3d 303, 310 (2d Cir. 2001) ("[W]hether AEDPA deference applies . . . is all but outcome-determinative.").

[14] Section 2254(d)(1) provides that federal courts shall not grant habeas relief with respect to claims that were fully adjudicated in state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Post-conviction review often involves a plethora of procedural traps for the unwary.[15] Moreover, claims of ineffective assistance of counsel and other forms of constitutional error that can be adjudicated only in post-conviction proceedings commonly rest on facts that appear nowhere in the record and therefore require the discovery and presentation of new evidence. Post-conviction claims are generally based on "information concealed by the state, . . . witnesses who did not appear at trial or who testified falsely, [inadequate investigation by the] trial attorney, . . . new developments [that] show the inadequacies of prior forensic evidence, . . . [and] juror misconduct." *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003); *see, e.g.*, *United States* v. *MacCollom*, 426 U.S. 317, 327 (1976). As a result, the "provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants." Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Judicial Conference of the United States, Committee Report (Sept. 27, 1989), *reprinted in* 45 Crim. L. Rep. 3239, 3240 (1989).

In short, state post-conviction procedure now presents the *only* opportunity for many habeas petitioners to seek redress of constitutional errors, and they cannot avail themselves of that opportunity if they lack legal assistance in connection with post-conviction petitions. Most States try to meet their new responsibilities by entitling habeas petitioners to such legal assistance. Alabama does not. And because Alabama's death row inmates lack such legal assistance, they fall prey to a variety of procedural defaults and other traps for the unwary that preclude them from bringing constitutional errors to the attention of courts conducting post-conviction review. As a result of procedural defaults and

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[15] *See* Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 Am. Crim. L. Rev. 1, 11 (2002) (describing procedural obstacles to obtaining relief).

stringent exhaustion requirements as well as the narrowing of habeas jurisdiction at the federal level, the new model renders such errors effectively unreviewable on federal habeas, too. As next discussed, Alabama's highly consequential failure to provide these inmates with any such legal assistance is as unconstitutional as it is unconscionable.

II. THE NEW MODEL OF POST-CONVICTION REVIEW PROVIDES FOR INADEQUATE ERROR-CORRECTION WHERE, AS IN ALABAMA, DEATH ROW INMATES LACK ADEQUATE LEGAL ASSISTANCE

This Court decided *Murray* v. *Giarratano*, 492 U.S. 1 (1989), in the midst of the transition from the independent-review model to the second-main-event model. In *Giarratano*, four Justices of the Court found that death row inmates had no constitutional right to counsel in state post-conviction proceedings. *Id.* at 8. It was Justice Kennedy's concurring opinion, however, that provided the necessary fifth vote for the judgment. Justice Kennedy's concurrence provides a more nuanced approach to the rights of death row petitioners, recognizing that "the complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Id.* at 14 (Kennedy, J., concurring).

Specifically, Justice Kennedy noted two salient features of Virginia's post-conviction system that mitigated the effects of the State's failure to provide counsel in all death penalty cases: (1) "Virginia's prison system . . . [was] staffed with institutional lawyers to assist in preparing petitions for postconviction relief" and (2) "no prisoner on death row in Virginia . . . [was] unable to obtain counsel to represent him in postconviction proceedings." *Giarratano*, 492 U.S. at 14-15 (Kennedy, J. concurring). As petitioners make abundantly clear, neither of these statements is true of Alabama today.

In fact, rather than making post-conviction proceedings more liberal in light of this shift in responsibility, Alabama has imposed burdensome standards and procedures on peti-

tioners seeking post-conviction review of constitutional error. Petitioners have described these roadblocks in great detail. *See* Pet. 9-19. They include Alabama's one-year statute of limitations for filing applications for post-conviction relief through proceedings authorized by Rule 32 of the Alabama Rules of Criminal Procedure.[16] In addition, habeas petitioners must contend with the issue preclusion rules embodied in Rule 32.2(a), which, among other things, preclude them from raising claims that were raised or could have been raised in prior proceedings.[17] These rules add a daunting level of complexity to the pleadings that Alabama petitioners must prepare. Habeas petitioners must not only identify and prepare complicated claims, but also explain why those claims are not barred under Rule 32.2(a), which usually requires arguing that prior counsel's failure to raise the claims at trial or on direct review constitutes ineffective assistance of counsel. *See* Pet. 13-14. Because virtually all inmates are unqualified to handle that complex task on their own, Alabama's scheme effectively denies post-conviction relief to uncounseled inmates, including those with meritorious constitutional claims.

Moreover, as petitioners note, the reforms at the state and federal level have been accompanied by the dramatic expansion of Alabama's death row population. *See* Pet. 11-12. As a result, there are not nearly enough volunteer attorneys to represent these inmates. *See id.* All of these changes underscore the necessity of providing death row inmates with legal assistance in preparing their post-conviction petitions.

For objective evidence of the failings of Alabama's system of post-conviction review as a method of correcting constitutional error, one need look no further than the reversal

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[16] Wilkes, *State Postconviction Remedies and Relief* 3:7 (2007) (noting that the statute of limitations was shortened from two years to one year on August 1, 2002, with an exception for newly-discovered material facts).

[17] Rule 32.2; Wilkes, *State Postconviction Remedies* 3:12.

rate of state convictions and sentences on habeas. During the period from 1973 to 1995, only 9% of death penalty cases were reversed at the state post-conviction stage in Alabama. Liebman, *A Broken System: Error Rates in Capital Cases, 1973-1995*, Alabama State Report Card (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/ (last visited May 10, 2007). During the same period, federal district courts sitting in habeas reversed 45% of the Alabama death penalty cases brought before them. *Id.* These were cases that had already undergone state-level review (often direct *and* post-conviction review).

Alabama's failure to provide legal assistance for death row inmates during the crucial stage of preparing state post-conviction petitions constitutes the weak link that undermines the integrity of the entire modern structure of capital criminal procedure as practiced in that State. The basic assumption underlying the transition outlined in the preceding pages was that the States would substitute their own effective post-conviction review of death penalty cases for that which the federal courts had previously provided on habeas. Alabama has not lived up to its end of the bargain.

As petitioners explain, Alabama's failure to provide any such post-conviction legal assistance to death row inmates is untenable in light of Justice Kennedy's concurrence in *Giarratano*. *See* Pet. 27-29. And, in any event, as this Court recognized in *Rhines*, subsequent developments (in that case the enactment of AEDPA), may justify the reconsideration of prior decisions reducing the availability of habeas relief. To the extent that *Giarratano* does not require the reversal of the Eleventh Circuit's decision, this Court should reconsider its holding in that case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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