No. 07-15187-P

IN THE

United States Court of Appeals for the Eleventh Circuit

CORY R. MAPLES,

Appellant,

v.

RICHARD F. ALLEN, COMMISSIONER OF THE ALABAMA DEPARTMENT OF CORRECTIONS,

Appellee.

On Appeal From the United States District Court
for the Northern District of Alabama
Docket No. 03-02399-CV-SLB-PWG

BRIEF FOR *AMICUS CURIAE* THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER, REHEARING AND REHEARING EN BANC

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December 23, 2009

CERTIFICATE OF INTERESTED PERSONS
***MAPLES v. ALLEN*, CASE NO. 07-15187-P**

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, *amicus curiae* certifies that the following is a complete list of trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal:

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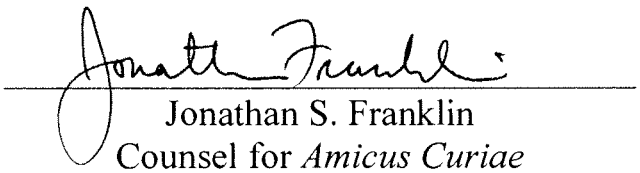

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STATEMENT OF COUNSEL

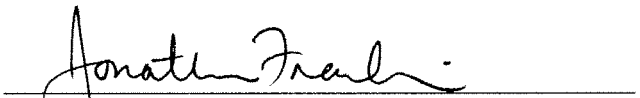
I express a belief, based on a reasoned and studied professional judgment, that the divided panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this Circuit and that reconsideration by the panel or consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: *Jones v. Flowers*, 547 U.S. 220 (2006); *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008); *Roberts v. Sutton*, 217 F.3d 1337 (11th Cir. 2000).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

1. Whether the panel majority properly held—in conflict with the decisions of the Supreme Court, this Court, and other circuits—that the purported state procedural default rule at issue is "adequate" as a matter of federal law to bar federal habeas review of petitioner's constitutional claims.

2. Whether the panel majority properly held—in conflict with the decisions of the Supreme Court, this Court, and other circuits—that there was no "cause" to excuse any procedural default, where such default indisputably occurred through no fault of petitioner and, instead, was due to failures of a court clerk and counsel.

Although *amicus curiae* has chosen in this brief only to address the second issue, it believes the first issue is also of exceptional importance and warrants rehearing.



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STATEMENT OF THE ISSUE

Whether the panel majority properly held—in conflict with the decisions of the Supreme Court, this Court, and other circuits—that there was no "cause" to excuse any procedural default, where such default indisputably occurred through no fault of petitioner and, instead, was due to failures of a court clerk and counsel.

INTEREST OF *AMICUS CURIAE*

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education. The Project's essential mission is to promote constitutional dialogue. It creates bipartisan committees whose members are former government officials, judges, scholars, and other prominent citizens. These committees reach across ideological and partisan lines to craft consensus recommendations for policy reforms. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government.

The Constitution Project regularly files amicus briefs in the U.S. Supreme Court and other courts in cases, like this one, that implicate its bipartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues. In 2000, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death

penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in the criminal justice system. Although the Initiative does not take a position on the death penalty itself, it is concerned that, as currently administered, the death penalty lacks adequate procedural safeguards and other assurances of fundamental fairness. The Committee issued its first report in 2001, and in 2006, issued an updated version of its report with thirty-two consensus recommendations. *See* The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* (2006) (www.constitutionproject.org/manage/file/30.pdf). The report concludes, *inter alia*, that the "[t]he lack of adequate counsel to represent capital defendants is likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error." *Id.* at 1.

The Constitution Project has a keen interest in the case. It raises vital issues about the government's duty to provide due process to prisoners by taking reasonable steps to ensure that they and their counsel receive notice of deadline-triggering orders, and the courts' concomitant obligation to ensure that individuals are not put to death solely because of errors that were no fault of their own. The representation of prisoners accused of or sentenced to the death penalty is unique in its difficulty, and in the consequences for prisoners when that representation is inadequate. This requires an effective system of representation, and

constitutionally adequate performance by courts and counsel in ensuring that prisoners receive fair notice of orders on which their lives may depend.

STATEMENT OF THE FACTS

Cory Maples was convicted of capital murder. Neither trial counsel had ever conducted a sentencing phase in a capital trial before. Slip op. 34 n.3. As chronicled in the 90-page federal habeas petition, counsel failed to request instructions that could have reduced his culpability, and to present or investigate evidence relevant to his sentencing. *Id.* A jury recommended death by a 10-2 margin, and the change of a single vote in Maples' favor would have spared his life. *Id.*

After his sentence was affirmed on direct appeal, Maples' new counsel petitioned for post-conviction relief under Ala. R. Crim. P. 32, his first opportunity to raise his ineffective assistance of counsel claims. *Id.* at 3. Nearly a year and a half later, and after denying a motion to dismiss, the trial court *sua sponte* issued an order under Rule 32 dismissing the petition. *Id.*

The trial court clerk sent the order to Maples' lead counsel at Sullivan & Cromwell in New York and local Alabama counsel. By then, both Sullivan & Cromwell counsel had left the firm. *Id.* A mailroom at the firm's offices returned the order to the trial court clerk unopened, with "Return to Sender—Left Firm" on the envelope. *Id.* The court clerk made no further effort to contact lead counsel, although they had performed "all of the substantive work" on the case. *Id.* Local

counsel received a copy, but having been involved only to facilitate *pro hac vice* admission for lead counsel, he did nothing. *Id.* at 3-4. As a result, Maples never received notice of the Rule 32 order before the deadline to appeal expired.

Maples sought leave to file an out-of-time appeal in the trial court and mandamus relief from the Alabama Supreme Court, which were denied. He then petitioned the Northern District of Alabama for habeas review of his ineffective assistance of counsel claims, but the district court denied the petition because of his alleged default in failing to timely appeal the Rule 32 order. Slip op. 7.

A divided panel of this Court affirmed, holding that an independent and adequate state ground for the procedural rule existed, *id.* at 14-18, and that there was no "cause" to excuse Maples' procedural default, because errors of post-conviction counsel can never constitute cause, *id.* at 18-20. Judge Barkett dissented, finding that there was no "adequate" ground to preclude federal court review of Maples' constitutional claims, and that equitable principles governing habeas corpus "require that Maples be permitted review of his claims when the alleged default of those claims occurred through no fault of his own." *Id.* at 33.

SUMMARY OF ARGUMENT

This case asks whether a man will be put to death solely because—through no fault of his own—workers in a mailroom and then a court clerk made careless decisions that prevented him from learning about a deadline-triggering order.

Maples has presented significant issues as to the ineffectiveness of his trial counsel. Yet the panel majority held that those claims—which the Court must presume for this appeal would save his life if considered—cannot be considered at all because errors committed by others prevented Maples from filing a state-court appeal on time. Consequently, the root problem raised by Maples' allegations—that he was sentenced to death because he was woefully represented at trial—remains unreviewed. No person should be put to death for such reasons. Rather, precedents of the Supreme Court, this Court, and other circuits hold that this intolerable result is not justified in circumstances like these.

Amicus curiae agrees with petitioner that the panel erred in holding that Alabama's procedural rule was "adequate" as a matter of federal law to bar federal habeas review of Maples' constitutional claims, and that this important issue warrants rehearing. *See* Pet. 5-10. But even if the Court disagrees, the panel's decision is nevertheless contrary to precedents from this and other courts that recognize an exception to that bar when a habeas applicant can demonstrate cause and prejudice for the procedural default. Although both issues warrant rehearing, *amicus curiae* here addresses only the reasons why the panel's holding that no "cause" exists for Maples' alleged procedural default warrants rehearing.

The panel majority held that Maples "cannot establish cause for his default because there is no right to post-conviction counsel." Slip op. 19. Although this is

incorrect as explained by Judge Barkett, the majority did not address the issue raised by Maples of whether the clerk's failure to provide notice was cause to excuse the default, which was also necessarily subsumed in the argument that the missed deadline occurred through no fault of Maples. *See* Appellant's Br. 18 n.2, 21; Appellant's Reply Br. 2. Maples suffered a total and complete breakdown in coordination on both ends—by the clerk's office ***and*** his post-conviction counsel—resulting in a missed deadline for which Maples had no fault whatsoever.

In the majority's view, no equitable principle allows federal court review of Maples' presumptively valid claims before the State puts him to death. But even if there may be no constitutional right to a post-conviction lawyer, ***if*** a prisoner has lawyers, he should be able to rely on them for notice of deadlines, and clerks must ensure such notice is received. If this decision stands, courts in this Circuit need never concern themselves with whether notice of deadline-triggering orders reach all post-conviction counsel or parties. Prisoners can have no expectation that such counsel will attend to their cases at all. And any mistakes by counsel, their firms, or court clerks will be borne by the prisoners alone, to the point of death in capital cases. This decision conflicts with precedent and warrants rehearing.

I. A MAN SHOULD NOT BE EXECUTED BECAUSE, THROUGH NO FAULT OF HIS OWN, HE DID NOT RECEIVE NOTICE OF A DEADLINE-TRIGGERING COURT ORDER.

Maples' post-conviction counsel left their firm without substituting counsel.

A mailroom, either at their law firm or in its building, returned the Rule 32 order unopened. A court clerk then received the unopened envelope by return mail, but did nothing. And there Maples' life—according to the panel majority—comes to an end without federal court review of his claims that he was denied constitutionally guaranteed assistance of counsel at trial. The State now intends to put Maples to death, but it failed to take the most obvious, reasonable steps to ensure that he received timely notice of the deadline-triggering order. Federal courts are not bound by these errors to ignore claims that would save a man's life.

As the petition persuasively demonstrates, Pet. 5-10, the failure to timely appeal the Rule 32 order was no default at all because Alabama lacked adequate grounds to enforce its procedural rule that provided for habeas review when "[t]he petition failed to appeal within the prescribed time and that failure was without fault on the petitioner's part." Ala. R. Crim. P. 32.1(f). But even when a claim is procedurally defaulted, a federal court will excuse the default where there is cause for and actual prejudice in a default. *See Mize v. Hall*, 532 F.3d 1184, 1190 (11th Cir. 2008). Cause is established if "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

One objective factor that impeded compliance with Alabama's procedural rule was the State itself, through the trial court clerk, who knew that Maples' lead

counsel did not receive notice of the Rule 32 order, but took no further steps to ensure all of Maples' counsel or Maples himself received the order. Cause to relieve a default exists where there is "interference by state officials that made compliance impossible." *Mize*, 532 F.3d at 1190. Whatever the additional fault of Maples' counsel, the clerk's decision to do nothing unquestionably interfered with Maples' ability to comply with the deadline to appeal the Rule 32 order.

In analogous—but less dire—circumstances, the Supreme Court has held that such failure to deliver notice of a deprivation of fundamental rights violates basic due process. In *Jones v. Flowers*, 547 U.S. 220 (2006), a Commissioner's repeat attempts to send a tax sale notice by certified mail resulted in the return of the unopened packet "unclaimed," leaving the homeowner with no notice before his house was sold. *Id.* at 223-24. That failed to satisfy that longstanding rule that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 229 (citation omitted).

Writing for the Court, Chief Justice Roberts reasoned that "no one 'desirous of actually informing' the owners would simply shrug his shoulders as the letters disappeared and say 'I tried.'" *Id.* at 229. Knowledge that certified mail to the homeowner's address was ineffective "triggered an obligation on the government's part to take additional steps to effect notice," *id.* at 230, and the failure to follow up

was unreasonable, even though the letters were reasonably calculated to reach their intended recipients when delivered to the postman. *Id.* at 229. As Chief Justice Roberts analogized, "if the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again." *Id.* at 229. "This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house." *Id.* at 230. But the Commissioner did "nothing." *Id.* at 234. When exerting extraordinary power against a property owner, "[i]t is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed." *Id.* at 239.

The same is necessarily true here, where a man's life, rather than just his property, is at stake. As in Chief Justice Roberts' analogy, the unopened, returned envelope with "Return to Sender—Left Firm" was the equivalent of watching the Rule 32 notice fall out of the postman's bag and down the drain. As a matter of basic due process, the State was required to do more to ensure that Maples received notice. Indeed, even something as simple as a call to counsel's former firm to ask for a forwarding address would have allowed the clerk to direct the notice to the proper person. Or, at a bare minimum, the clerk could have sent the notice to

Maples directly when he or she learned that his lead counsel did not receive it.[1]

In other contexts, this Court requires the government to ensure notice, even when the stakes are far less significant than life or death. For example, the Court tolls Title VII filing deadlines when the EEOC fails to ensure that plaintiffs receive "right-to-sue" letters authorizing suit.[2] The Court requires analysis "on a case-by-case basis to fashion a fair and reasonable rule for the circumstances of each case," taking care not to condition a claimant's right to sue on "fortuitous circumstances or events beyond [her] control." *Kerr*, 427 F.3d at 952. Where it is shown that "the claimant through no fault of his own has failed to receive the suit letter . . . the delivery of the letter to the mailing address cannot be considered to constitute statutory notification." *Franks*, 495 F.2d at 405; *Kerr*, 427 F.3d at 952. The burden rests on the government to ensure notice where final termination of a right

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[1] It is not enough that local counsel received a copy of the order. Due process requires "the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *Id.* at 230 (citing *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) (notice of forfeiture proceedings sent to home address inadequate when State knew that owner was in prison)). Lead counsel "performed all of the substantive work," in the case, slip op. 4, and the clerk knew that that counsel had not received notice of the order, which had unexpectedly been issued *sua sponte* nearly a year and a half after the petition was filed.

[2] *See Franks v. Bowman Transp. Co.*, 495 F.2d 398, 404 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976); *Kerr v. McDonald's Corp.*, 427 F.3d 947 (11th Cir. 2005); *Stallworth v. Wells Fargo Armored Serv. Corp.*, 936 F.2d 522, 524 (11th Cir. 1991).

is at stake. The need is only magnified when life is at stake.

Thus, in capital cases the Court has excused procedural defaults for "cause" where they were due to the State's clerical errors but no fault of the prisoner.[3] The Court has also found equitable tolling to apply where the State was at fault due to clerical mistakes.[4] In *Roberts*, for example, a default was excused for "cause" when the appellate record was not properly transmitted to a state court of appeals, because "[w]hatever the reason for this default, the important point is that there is nothing in the record to suggest that Roberts was responsible for whatever the problem was with the record in the state appellate court." 217 F.3d at 1340-41.

The clerk's failure to notify Maples and his lead counsel is an even clearer example of "cause" than in *Roberts*. While *pro se* litigants are treated more

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[3] *See Roberts v. Sutton*, 217 F.3d 1337 (11th Cir. 2000); *Sanders v. United States*, 113 F.3d 184, 187 (11th Cir. 1997) ("when through no fault of his own, a *pro se* litigant does not receive notice of the order from which he seeks to appeal, it would be unjust to deprive him of the opportunity to present his claim to this court"); *Alexander v. Dugger*, 841 F.2d 371 (11th Cir. 1988) (*pro se* litigant's motion for rehearing never docketed by clerk); *United States v. Novaton*, 271 F.3d 968, 992-93 (11th Cir. 2001) (appellant not accountable for exhibits not included in record "[t]hrough no fault of his own").

[4] *See Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005) (equitable tolling applies "when the State's conduct prevents the petitioner from timely filing"), *aff'd* 549 U.S. 327 (2007); *Knight v. Schofield*, 292 F.3d 709, 712 (11th Cir. 2002) (petitioner misled by court clerk); *Outler v. United States*, 485 F.3d 1273, 1286 (11th Cir. 2007) (legally deficient recharacterization of a pleading by court prevented petitioner from timely filing claims); *Spottsville v. Terry*, 476 F.3d 1241, 1245 (11th Cir. 2007) (petitioner misled by the state habeas court into filing with wrong court).

leniently in some respects, they are individually responsible for learning of and meeting deadlines. Maples, however, never knew of the deadline and reasonably relied on outside counsel and the court, who appeared to be fulfilling their duties. He should not be put to death without federal court review of his presumptively valid claims, where the alleged procedural default was no fault of his own, but was caused (among other reasons) by failure of the clerk to ensure proper notice.

II. THE PANEL ERRED IN HOLDING THAT MAPLES SHOULD LOSE HIS LIFE BECAUSE POST-CONVICTION COUNSEL'S ERRORS PRECLUDED REVIEW OF TRIAL COUNSEL'S ERRORS.

The panel also erred in holding that abandonment by Maples' post-conviction counsel is not "cause" for the alleged default merely because Maples had no legal right to post-conviction representation. *See* Slip op. 19. This holding ignores the Supreme Court's basic command that "[h]abeas corpus is governed by equitable principles." *Munaf v. Geren*, 128 S. Ct. 2207, 2220 (2008).

It is "undeniable that the Federal courts . . . have broad equitable power to remedy and obviate all traces of the constitutional wrong." *Sullivan v. Murphy*, 478 F.2d 938, 966 (D.C. Cir. 1973). Nowhere is rigid inflexibility less fitting than when the penalty is death. "[T]he death penalty is different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). In its finality, death is "qualitatively different from a sentence of imprisonment, however long," creating a "corresponding difference in

the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Here, the ineffective assistance of Maples' trial counsel—which resulted in the bare minimum verdict necessary to impose the death sentence—renders that sentence wholly unreliable. Yet the panel held that this presumptively valid claim is barred because Maples received yet ***more*** ineffective assistance at the post-conviction stage. No principal of justice can or should sanction such an injustice. A habeas court "should be able to consider the ineffective assistance of post-conviction counsel when determining if equity requires review on the merits of otherwise procedurally barred claims." Slip op. 35 n.4 (Barkett, J., dissenting).

The panel's contrary decision conflicts with this Court's recent holding that the federal habeas deadline is equitably tolled "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Downs v. McNeil*, 520 F.3d 1311, 1322 (11th Cir. 2008). In *Downs*, the Court ***rejected*** the position of the panel majority in this case, which held Maples strictly accountable for all failings of his post-conviction counsel (and, as a result, his trial counsel too). Rather than adopting a "bright-line" approach that attributes all actions of post-conviction counsel to the client, *Downs* adopted the contrary position of other circuits,[5] distinguishing between

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[5] *See Rouse v. Lee*, 339 F.3d 238, 246, 250 n. 14 (4th Cir. 2003) (en banc)

ordinary attorney negligence and "serious misconduct" such as abandonment, 520 F.3d at 1321—a distinction the panel wholly failed to recognize.[6]

There is no reason why deadlines for federal habeas review are equitably tolled for egregious conduct or abandonment by post-conviction counsel, but no equitable remedy can excuse a missed state court deadline that is no fault of the prisoner. In *Downs*, it was post-conviction counsel's very failure to timely file the state habeas petition that caused him to miss his federal habeas deadline. *Id.* at 1322-23. Downs repeatedly queried and prodded his attorneys to attend to deadlines, update case status, and complete timely filings, but his counsel's "deceit and delay" put him in an "untenable position" in which he received notice of the state court's ruling with only one day remaining in his federal limitations period.

(missed deadline "due to circumstances external to the party's own conduct," including "utter abandonment"); *Fleming v. Evans*, 481 F.3d 1249 (10th Cir. 2007); *United States v. Martin*, 408 F.3d 1089, 1093 (8th Cir. 2005); *Spitsyn v. Moore*, 345 F.3d 796, 798 (9th Cir. 2003); *Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir. 2003); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002); *but see Powell v. Davis*, 415 F.3d. 722, 727 (7th Cir. 2005) (adopting bright-line rule rejected in *Downs*).

[6] Instead, the panel, slip op. 19-20, relied upon cases that not only pre-date *Downs*, but are readily distinguishable. *Cf. Jimenez v. Fla. Dep't of Corr.*, 481 F.3d 1337, 1344 (11th Cir. 2007); *Henderson v. Campbell*, 353 F.3d 880, 899-900 (11th Cir. 2003). Those defaults resulted from failures to present claims on initial state habeas review. By contrast, Maples presented his ineffective assistance of counsel claims at the first opportunity in his Rule 32 petition, but failed to exhaust appellate remedies not as a result of ordinary ineffective assistance or negligence of counsel, but total abandonment. *Compare Downs*, 520 F.3d at 1321.

Id. at 1322. The Court held the deadline was equitably tolled because these circumstances "stood in his way" and were "beyond his control." *Id.* at 1325. But Maples' situation is even more egregious because Maples reasonably relied on the counsel who had prepared his Rule 32 petition to finish their job, with no indication that he would be left defenseless when they unexpectedly abandoned him.

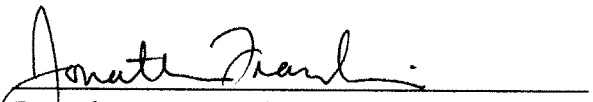
This is not a case about simple attorney negligence, or routine decisions by counsel not to argue issues on appeal; it is about the State's failure to ensure due process in the highest-stakes litigation of all, and outright abandonment by post-conviction counsel. Barring further relief, Alabama will put Maples to death, with the acquiescence of this Court, without a federal court hearing Maples' claims of ineffective assistance of his trial counsel, which likely caused the death sentence.

Even if Maples' post-conviction counsel were free to abandon him because he had no constitutional right to their representation, equity demands that Maples receive federal review of his presumptively valid claims. When life is in the balance, errors or omissions unblemished by any fault of a defendant should not prevent review of a State's decision to put him to death. The panel majority's contrary holding defies not only basic principles of justice but binding precedent.

CONCLUSION

For the foregoing reasons, and those in the petition for rehearing and rehearing en banc, the petition should be granted and the judgment below reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 23rd day of December, 2009, the forgoing Brief for *Amicus Curiae* The Constitution Project in Support of Petitioner, Rehearing and Rehearing En Banc was served by first class mail, postage prepaid, on the following parties:

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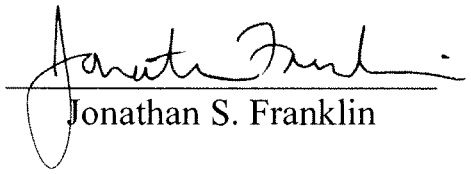

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