AUG 10 2010

No. 10-63

IN THE
Supreme Court of the United States

CORY R. MAPLES,

Petitioner,

v.

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

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

LISA S. BLATT
Counsel of Record
ANTHONY J. FRANZE
MICHAEL TYE
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Amicus Curiae

Blank Page

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THIS COURT'S GUIDANCE IS URGENTLY NEEDED ON THE DOCTRINE OF ADEQUATE STATE GROUNDS	4
II. THIS CASE IS AN IDEAL COMPANION TO *WALKER v. MARTIN*	6
A. *Walker* Presents Only One Side of the State-Federal Balance Needed to Clarify the Adequate State Ground Doctrine	7
B. The Federal Interests in this Death Penalty Case Are Substantial, Making It a Fitting Companion to *Walker*	10
C. *Walker* and this Case Provide the Best Context in Which to Balance the Competing State and Federal Interests Over Which Party Bears the Burden of Proving Adequacy	18

Contents

Page

D. This Case Provides Much Needed Context to *Walker* to Enable the Careful Calibration of the Boundaries of State Case-Law-Based Interpretation of Timeliness Rules 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Beard v. Kindler,
130 S. Ct. 612 (2009) ..... *passim*

Bostick v. Stevenson,
589 F.3d 160 (4th Cir. 2009) 22

Coleman v. Thompson,
501 U.S. 722 (1991) 3, 6

Cone v. Bell,
129 S. Ct. 1769 (2009) 5

Davis v. Wechsler,
263 U.S. 22 (1923) 8-9

Ex parte Johnson,
806 So. 2d 1195 (Ala. 2001) 12

Ex parte Miles,
841 So. 2d 242 (Ala. 2002) 12

Ex parte Robinson,
865 So. 2d 1250 (Ala. Crim. App. 2003) 12

Ford v. Georgia,
498 U.S. 411 (1991) 9

Harris v. Alabama,
513 U.S. 504 (1995) 18

Authorities

Page

Henderson v. Campbell,
353 F.3d 880 (11th Cir. 2003) 19

Holland v. Florida,
130 S. Ct. 2549 (2010) 20, 23

Jones v. Sussex I State Prison,
591 F.3d 707 (4th Cir. 2010) 19

Lee v. Kemna,
534 U.S. 362 (2002) 3, 6, 9-10

Lonchar v. Thomas,
517 U.S. 314 (1996) 23

Martin v. Walker,
357 F. App'x 793 (9th Cir. 2009) ..... *passim*

Murray v. Giarratano,
492 U.S. 1 (1989) 12

New York v. Hill,
528 U.S. 110 (2000) 11

New York v. United States,
505 U.S. 144 (1992) 8

Paredes v. Quarterman,
574 F.3d 281 (5th Cir. 2009) 19

Siebert v. Allen,
455 F.3d 1269 (11th Cir. 2006) 19

Authorities

Page

STATUTES AND RULES

Ala. Code § 13A-5-47(d)-(e) 17

Ala. R. Crim. P. 32.1(e) 11

Ala. R. Crim. P. 32.1(f) 10-11, 22

OTHER AUTHORITIES AND MATERIALS

American Bar Ass'n,
Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report (2006) ... 15-16, 17-18

American Civil Liberties Union,
Broken Justice: The Death Penalty in Alabama (2005) 15, 17-18

John H. Blume et al., *In Defense of Non-capital Habeas: A Response to Hoffman and King* (Cornell Law Faculty Working Papers, Paper No. 66, 2010), *available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1068&context=clsops_papers 13, 20

Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petition for Writ of Certiorari, Walker v. Martin, No. 09-996 (U.S. Mar. 24, 2010) 5

Authorities

Page

Brief of *Amici Curiae* States of California [and Twenty-Five Other States], Beard v. Kindler, 130 S. Ct. 612 (2009) (No. 08-992) 8

Victor E. Flango, *Habeas Corpus in State and Federal Courts* (1994) 16

Eric M. Freedman, Giarratano *is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079 (2006) 16

Crystal Nix Hines, *Lack of Lawyers Blocking Appeals in Capital Cases*, N.Y. Times, July 5, 2001 17

Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts* (2007) 12-14

James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000) 12

NAACP Legal Def. & Educ. Fund, Inc., *Death Row U.S.A.: Winter 2010* (2010) 14

Petition for Writ of Certiorari, Walker v. Martin, No. 09-996 (U.S. Feb. 17, 2010) ..... *passim*

Authorities

Page

Eve Brensike Primus,
A Structural Vision of Habeas Corpus,
98 Calif. L. Rev. 1 (2010) 4

Recent Case,
Federal Courts–Habeas Corpus–Fourth Circuit Fails to Reach a Judgment on the Merits of a Constitutional Claim Based on the State Procedural Default Doctrine,
120 Harv. L. Rev. 2246 (2007) 4

Reply to Brief in Opposition, Walker v. Martin,
No. 09-996 (U.S. May 27, 2010) 21, 23

Sara Rimer,
Questions of Death Row Justice for Poor People in Alabama, N.Y. Times, Mar. 1,
2000 17

Tracy L. Snell,
Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2005* (2006), *available at* http://bjs.ojp.usdoj. gov/content/ pub/pdf/cp05.pdf. 13, 15

Tracy L. Snell,
Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2008 - Statistical Tables* (2009), *available at* http:// bjs.ojp.usdoj.gov/content/ pub/pdf/cp08st.pdf
..... 13, 14

Authorities

Page

Bryan A. Stevenson,
Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases, 41 Harv. C.R.-C.L. L. Rev. 339 (2006) 4, 14, 20

U.S. Census Bureau,
Table 1: Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2009 (2009), http://www.census.gov/popest/states/NST-ann-est.html 14-15

16B Charles Alan Wright et al.,
Federal Practice and Procedure (2d ed. 1996 & Supp. 2010) 3, 4, 6, 8

Larry W. Yackle,
State Convicts and Federal Courts: Reopening the Habeas Corpus Debate, 91 Cornell L. Rev. 541 (2006) 4

STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. To that end, NACDL frequently has filed *amicus curiae* briefs in this Court in cases implicating its substantial interest in preserving the procedural and evidentiary mechanisms necessary to ensure fairness in the criminal justice system.

The present case is of particular importance to NACDL because this Court's review urgently is needed both to clarify the standards governing when a state default rule is "adequate" to bar federal habeas review and to correct a manifest injustice where a man's life literally hangs in the balance.

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution intended to fund its preparation or submission. Counsel of record for both parties received notice of *amicus curiae*'s intent to file this brief more than 10 days prior to the brief's due date and have consented to its filing in letters being lodged herewith.

SUMMARY OF ARGUMENT

Cory Maples did not receive notice of an Alabama state court order denying his claims of federal constitutional error because a large New York law firm returned the order to the state court unopened. The Alabama clerk's office, upon receipt of the unopened notice, did nothing in response. The State then waited until the time for appeal had expired to notify Maples of the order. As a result, Maples missed the deadline for his state court appeal, and is to be executed without review of strong claims that he—like so many indigent defendants subject to Alabama's long-criticized and underfunded indigent defense system—received constitutionally ineffective assistance of counsel at trial and at sentencing.

This result was possible only because the Alabama courts—in the face of a written procedural rule allowing for out-of-time appeals where the "failure was without fault on the petitioner's part"—denied Maples's appeal as untimely. A divided Eleventh Circuit compounded that injustice, holding that the State's application of its procedural rule was "adequate" and therefore barred federal habeas review.

As the petition demonstrates, the Eleventh Circuit's decision conflicts with the decisions of this Court and other circuits in several respects, and exacerbates the uncertainty that already permeates the law governing procedural defaults. Pet. at 9-32. While this alone merits review, the Court's recent grant of certiorari in *Martin v. Walker*, 357 F. App'x 793 (9th Cir. 2009), *cert. granted*, 09-996, confirms the need for clarity in this area.

The present case is an ideal companion to *Walker* for several reasons. *First*, this Court has recognized

that, at its core, the adequate state ground doctrine is "about federalism." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). The doctrine thus "must be measured in the tension that exists between the interest in protecting federal rights and the potentially conflicting interests of state courts in adhering to their own procedures." 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4027 (2d ed. 1996 & Supp. 2010); *accord Lee v. Kemna*, 534 U.S. 362, 388 (2002) (Kennedy, J., dissenting). *Walker* presents the Court with a narrow context in which to strike that balance—the State there singularly focuses on "state sovereignty" and state interests in seeking this Court's "broad guidance" on the adequacy doctrine. This case would permit the Court also to consider the doctrine in the context of the substantial countervailing federal interests underlying the adequacy inquiry: Alabama seeks to execute a man after its courts contorted a state procedural rule to prevent the enforcement of essential federal rights.

Second, this case and *Walker* together provide a complete framework in which to resolve a conflict regarding which party bears the burden of proving the state rule is "adequate." In *Walker*, the Ninth Circuit properly allocated the burden to the State; the Eleventh Circuit below allocated the burden to the prisoner.

Finally, whereas *Walker* concerns the adequacy of a judge-made, overtly discretionary rule, this case involves a complementary and more robust context in which to provide guidance on the adequacy inquiry: the application of a written timing rule interpreted under an evolving body of state case law.

In all events, this case alone is worthy of the Court's review. The grant of certiorari in *Walker* only heightens the need for plenary review here.

ARGUMENT

I. THIS COURT'S GUIDANCE IS URGENTLY NEEDED ON THE DOCTRINE OF ADEQUATE STATE GROUNDS

This Court's immediate guidance and clarification is manifestly needed on the standards governing when a state default rule is "adequate" to bar federal habeas corpus review.

Commentators have characterized the law in this area as "unworkable,"[2] "constantly changing,"[3] and riddled with "confusion as to when a state procedural default is an adequate state ground to preclude federal habeas review."[4] The leading federal procedure treatise dedicates entire sections to discussing the prevailing "uncertainty," trying to glean "possible interpretations" from procedural default jurisprudence.[5] States likewise

---

[2] Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 Calif. L. Rev. 1, 1, 4 (2010); *accord, e.g.*, Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 Cornell L. Rev. 541, 559 & n.106 (2006).

[3] Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 Harv. C.R.-C.L. L. Rev. 339, 349 (2006).

[4] Recent Case, *Federal Courts–Habeas Corpus–Fourth Circuit Fails to Reach a Judgment on the Merits of a Constitutional Claim Based on the State Procedural Default Doctrine*, 120 Harv. L. Rev. 2246, 2246 (2007).

[5] 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4028 (2d ed. 1996 & Supp. 2010); *see also id.* § 4027.

have urged this Court "to further clarify the rules relating to the 'adequacy' of state procedural bars."[6]

Indeed, Justices of this Court recently have recognized that, in the "proper case," concerns relating to the adequacy inquiry "should be addressed." *Beard v. Kindler*, 130 S. Ct. 612, 620 (2009) (Kennedy, J., joined by Thomas, J., concurring). But the proper case thus far has eluded the Court, principally because the issues have arisen in atypical contexts, rendering them "unsuitable vehicle[s] for providing broad guidance on the adequate state ground doctrine." *Id.* at 619 (majority opinion); *see also Cone v. Bell*, 129 S. Ct. 1769, 1786 (2009) (Roberts, C.J., concurring in the judgment) (noting that the majority "decision is grounded in unusual facts that necessarily limit its reach" in case involving procedural default question).

This Court's grant in *Walker v. Martin*, No. 09-996, reflects the need for additional guidance in this area. But *Walker* by itself again will not provide a complete vehicle for the Court to consider the full contours of the

---

[6] Petition for Writ of Certiorari at 6, Walker v. Martin, No. 09-996 (U.S. Feb. 17, 2010) [hereinafter *Walker* Pet.]; *see also* Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petition for Writ of Certiorari at 9-10, Walker v. Martin, No. 09-996 (U.S. Mar. 24, 2010) ("This Court's jurisprudence of 'adequate state grounds' has been plagued by imprecise language . . . . *Kindler* took a step in the right direction . . . . However, the step was small and the holding narrow. A larger step is sorely needed." (citations omitted)).

problems confounding lower courts. The present case, by contrast, would afford the Court the opportunity to address numerous conflicts and add clarity to important and recurring questions. *See* Pet. at 12-32. Beyond that, this case would serve as a fitting companion and corollary to the issues at stake in *Walker*.

II. THIS CASE IS AN IDEAL COMPANION TO *WALKER v. MARTIN*

"The rule that an adequate state procedural ground can bar federal review of a constitutional claim has always been 'about federalism,' for it respects state rules of procedure while ensuring that they do not discriminate against federal rights." *Lee v. Kemna*, 534 U.S. 362, 388 (2002) (Kennedy, J., dissenting) (quoting *Coleman v. Thompson*, 501 U.S. 722, 726 (1991)). As such, the doctrine "must be measured in the tension that exists between the interest in protecting federal rights and the potentially conflicting interests of state courts in adhering to their own procedures." 16B Wright et al., *supra*, § 4027. Defining the parameters of the adequacy inquiry thus requires "a proper constitutional balance" of the state and federal interests at stake. *Kindler*, 130 S. Ct. at 620 (Kennedy, J., concurring).

Whereas the State in *Walker* presents one side of the federalism scale, this case presents the counterbalance necessary to provide complete guidance on the adequacy doctrine.

A. *Walker* Presents Only One Side of the State-Federal Balance Needed to Clarify the Adequate State Ground Doctrine

1. The State in *Walker* urges the Court to rework the adequate state ground doctrine based on the apparent premise that there are few, if any, legitimate federal interests justifying federal review of state procedural bars. In *Walker*, the California courts denied a prisoner's state habeas corpus petition filed five years after his conviction on the ground that the prisoner failed to satisfy the State's judge-made, discretionary rule that habeas petitions must be filed without "substantial delay." *See Martin v. Walker*, 357 F. App'x 793, 794 (9th Cir. 2009). The Ninth Circuit held that the State's timeliness rule was "inadequate" to bar federal habeas review because the rule had not been "firmly defined" by California courts, and because the State had "not met its burden of proof of showing that the standard is consistently applied." *Id.*

In seeking review in this Court, the State invoked the principles of "state sovereignty," "federalism," and "comity." *E.g.*, *Walker* Pet. at 5-9. It argued broadly that federal "review for discretionary or inconsistent enforcement of state procedural rules is wasteful and unreliable," *id.* at 5, and constitutes "untenable second-guessing of the state courts on state-law questions." *Id.* at 8. The proper approach to the adequacy inquiry, the State argued, was for federal courts to give virtually unfettered deference to state rules and state

interpretation of state rules. *See id.* at 5-6, 8-17.[7] Under this proposed deferential standard, the State argued that the Ninth Circuit's decision was an "affront to notions of federalism and comity." *Id.* at 7. Given the lack of clarity surrounding the adequacy inquiry, the State urged the Court to accept review to reverse the Ninth Circuit and "provide broad guidance" on these federalism concerns. *Id.* at 6, 17.

2. Given its context, the State in *Walker* did not address—or even acknowledge—that "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman*, 501 U.S. at 759 (Blackmun, J., dissenting)). The adequacy of a state procedural bar, therefore, must be measured not just in terms of a state's interest in adhering to its own procedures, but also against the legitimate federal interest in ensuring that state rules do not arbitrarily discriminate against the protection of important federal rights. 16B Wright et al., *supra*, § 4027. As Justice Holmes explained, "[w]hatever springes the State may set for those who are endeavoring to assert rights that

---

[7] Other states in the past have made similar arguments. *See* Brief of *Amici Curiae* States of California [and Twenty-five Other States] in Support of Petitioner at 5-11, Beard v. Kindler, 130 S. Ct. 612 (2009) (No. 08-992) (arguing that federal courts should accept state procedural default rules as "adequate" except in "rare cases"); *id.* at 12-27 (arguing that there is no sufficient federal interest in reviewing "inconsistency" of state rules, that federal review is "wasteful," and "entangles the federal court in untenable second-guessing of state-law rulings").

the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

Recognizing the substantial federal interest side of the balance, this Court repeatedly has found state procedural rules inadequate to bar review of federal claims. The Court, for instance, has found that habeas review may not be denied where state rules fail to provide fair notice or are arbitrary, inconsistent, or unpredictable in application: "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Ford v. Georgia*, 498 U.S. 411, 423 (1991) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958)); *accord Kindler*, 130 S. Ct. at 619 (Kennedy, J., concurring) (quoting same).

The Court also has "been mindful of the danger that novel state procedural requirements will be imposed for the purpose of evading compliance with a federal standard." *Kindler*, 130 S. Ct. at 619 (Kennedy, J., concurring) (citing *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964)); *accord Ford*, 498 U.S. at 424 (citing same).

Indeed, the Court has recognized that—even when a state rule is sound—there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop

consideration of a federal question." *Lee*, 534 U.S. at 376 (due process challenge to trial court's denial of oral request for continuance was not procedurally barred where state rule firmly required such motions to be in writing and accompanied by affidavit).

Any "broad guidance," *Walker* Pet. at 6, 17, on the adequate state ground doctrine, then, should take into account not just state sovereignty concerns, but also legitimate federal interests that are not the focal point of the State's petition in *Walker*. Granting review in this case as a companion to *Walker* would allow the Court to do just that.

B. The Federal Interests in this Death Penalty Case Are Substantial, Making It a Fitting Companion to *Walker*

Whereas the State in *Walker* portrays a doctrine that tramples state interests, this case underscores why the adequacy doctrine is needed to ensure that capricious application of state procedural rules does not discriminate against substantial federal rights.

1. The circumstances in this case facially call out for scrutiny of the Alabama courts' treatment of Maples and puzzling construction of their own procedural rules. *See* Pet. App. at 222a-237a. While the prisoner in *Walker* waited five years to file his habeas petition, Maples sought relief as soon as he learned that his petition had been denied, and his delay seemed to fall squarely within the plain terms of a written criminal procedure rule. Alabama Rule of Criminal Procedure 32.1(f) provides that a petitioner may obtain relief where the failure to

timely appeal "was without fault on the *petitioner's* part." Ala. R. Crim. P. 32.1(f) (emphasis added).

Nowhere does that rule state or give notice that an error of counsel is imputed to the petitioner. By contrast, the immediately preceding paragraph, Rule 32.1(e), denies relief based on evidence known *either* by "the petitioner *or* the petitioner's counsel" at the time of trial or sentencing. Ala. R. Crim. P. 32.1(e) (emphasis added). Rule 32.1(e) thus gives petitioners explicit notice of an instance where an error of counsel will be imputed to the petitioner.[8] The Alabama courts, however, read into Rule 32.1(f) an additional implied imputation hurdle that appears nowhere in the rule's text.

Not surprisingly, therefore, consistent with the language and obvious purpose of the Rule, no case prior to the rulings against Maples had held that a lawyer's failure to file a timely appeal is the "fault" of "the petitioner" under Rule 32.1(f). To the contrary, as the dissent below noted, Alabama courts had permitted an out-of-time appeal on "indistinguishable facts." Pet App. at 30a (discussing the *Marshall* case). Further, Alabama courts repeatedly had permitted out-of-time appeals for *pro se* defendants—who (unlike Maples) had no reason to justifiably rely on counsel to monitor their cases—where the court clerk failed to give them notice of

---

[8] The differing treatments in the two rules makes sense. When counsel knows of evidence and does not use it at trial, as implicated in Rule 32.1(e), the likelihood is that counsel has made a tactical decision that is attributable to the defendant. *New York v. Hill*, 528 U.S. 110, 114-15 (2000). By contrast, there are no tactical reasons to miss the deadline to appeal implicated in Rule 32.1(f).

adverse decisions. *See Ex parte Miles*, 841 So. 2d 242, 244-45 (Ala. 2002); *Ex parte Johnson*, 806 So. 2d 1195, 1196-97 (Ala. 2001); *Ex parte Robinson*, 865 So. 2d 1250, 1251-52 (Ala. Crim. App. 2003) (per curiam).

Thus, the Alabama courts ignored the plain language and structure of a procedural rule and precedent to deny Maples the ability to assert on the merits what the dissent below recognized were serious constitutional claims. Pet. App. at 31a n.3.

2. The present case, moreover, would allow this Court to consider the full contours of the adequacy inquiry in a situation where the federal interests are paramount: unlike *Walker*, this is a death penalty case. Despite common perceptions that habeas petitions are frivolous, the success rate in capital habeas cases heard on the merits is quite high. *See Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment) ("a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings"); Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts* 51 (2007) [hereinafter King Report] (about 1 in 8 habeas petitions filed in capital cases received relief); James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* 4 (2000) (roughly 40% (237 of 599) of capital sentences imposed between 1973 and 1995 reviewed in a first habeas petition overturned due to "serious error").[9]

---

[9] The King Report suggested lower success rates for non-capital habeas petitions, like *Walker*, but recent reports argue that the King Report vastly underestimates the non-capital (Cont'd)

More generally, according to Department of Justice statistics, between 1973 and 2005, courts overturned 2,702 death convictions or sentences, which represents 35.3% of the total number of capital cases. *See* Tracy L. Snell, Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2005* 16 app. tbl. 4 (2006) [hereinafter DOJ *Capital Punishment 2005*], *available at* http://bjs.ojp.usdoj. gov/content/pub/pdf/cp05.pdf.[10]

Review of the merits of state capital convictions, therefore, is of vital importance to ensure the public's confidence in the integrity of the death penalty. Nevertheless, many federal constitutional errors, like the ones here, are never considered by federal courts because of a state's procedural default rule. A recent study commissioned by the Department of Justice found

---

(Cont'd)
success rate. *See* John H. Blume et al., *In Defense of Non-capital Habeas: A Response to Hoffman and King* 18 & n.85 (Cornell Law Faculty Working Papers, Paper No. 66, 2010), *available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1068&context=clsops_papers.

[10] More recent statistics do not segregate the cases in which the conviction or sentence has been overturned, but appear consistent with the DOJ *Capital Punishment 2005* report. *See* Tracy L. Snell, Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2008 - Statistical Tables* 13 tbl. 10 (2009) [hereinafter DOJ *Capital Punishment 2008*], *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cp08st.pdf (reporting that between 1977 and 2008, 3,315 "persons [were] removed from a sentence of death because of statutes struck down on appeal, sentences or convictions vacated, commutations, or death by other than execution," which represents 43.3% of the total number of death sentences).

that 42% of death penalty cases included a federal court ruling that at least one claim was barred under state procedural default rules. King Report, *supra*, at 48; *accord* Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 Harv. C.R.-C.L. L. Rev. 339, 350 (2006) ("in death penalty cases, the great majority of substantive claims alleging constitutional violations . . . are procedurally barred").

3. These considerations are amplified in the State of Alabama. Alabama has the fifth largest death row population of all the states. *See* DOJ *Capital Punishment 2008*, *supra*, at 7 tbl. 4; *see also* NAACP Legal Def. & Educ. Fund, Inc., *Death Row U.S.A.: Winter 2010*, at 35-36 (2010). When accounting for population, Alabama has more death row inmates per capita than any other state.[11]

---

[11] According to the most recent Department of Justice statistics, Alabama had 205 prisoners on death row, giving it the fifth largest death row population of the states as of year-end 2008. *See* DOJ *Capital Punishment 2008*, *supra*, at 7 tbl. 4. Only California, Florida, Texas, and Pennsylvania had more prisoners under sentence of death. *Id.* (CA, 669; FL, 390; TX, 354; PA, 223). Accounting for total state population, however, Alabama has the most prisoners on death row per capita. According to the U.S. Census Bureau, Alabama had 4,677,464 residents as of 2008, while California, Florida, Texas, and Pennsylvania all had much larger populations. U.S. Census Bureau, *Table 1: Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2009* (2009), http://www.census.gov/popest/states/NST-ann-est.html. Dividing the number of Alabama's death row inmates as of 2008 by its July 2008 population reveals that 4.4

(Cont'd)

According to Justice Department statistics, of the cases where claims were considered on the merits, 33% of death convictions or sentences in Alabama have been overturned. *See* DOJ *Capital Punishment 2005*, *supra*, at 16 app. tbl. 4 (123 of 368 sentences or convictions from 1973 to 2005 overturned; 2 sentences commuted). Another study determined that state and federal courts found "serious error" in 77% of Alabama capital cases between 1973 and 1995. Liebman et al., *supra*, at 74. But those cases involved the few who managed to be heard on the merits.

Alabama's system of capital punishment has been widely reported as "broken" and repeatedly has been singled out as failing to provide meaningful trial and post-conviction protections in death penalty cases. *See generally* American Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* iii (2006) [hereinafter ABA Report] (noting that Alabama's approach to indigent defense "leads to a system where serious fairness and accuracy breakdowns in capital cases are virtually inevitable."); American Civil Liberties Union, *Broken Justice: The Death Penalty in Alabama* 1 (2005) [hereinafter ACLU Report] ("The structure of the state's criminal justice system and the power given to its trial and appellate judges compromise and limit the ability of capital defendants to get a fair trial and appropriate sentencing.").

(Cont'd)
out of every 100,000 people in Alabama are on death row. *See id.* By contrast, California has 1.8 for every 100,000; Florida 2.1 per 100,000; Texas 1.5 per 100,000; and Pennsylvania 1.8 per 100,000.

Alabama is one of the few death penalty states that does not provide counsel to inmates on death row. *See* ABA Report, *supra*, at iv ("With one exception, Alabama stands alone in failing to guarantee counsel to indigent defendants sentenced to death in state post-conviction proceedings."); *accord* Eric M. Freedman, Giarratano *is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079, 1089-90 (2006) ("The current leading example is Alabama, which has no system at all for providing prefiling assistance to capital prisoners wishing to pursue postconviction actions, known locally as Rule 32 proceedings." (footnotes omitted)).

As a result, "Alabama prisoners are at the mercy of whatever pro bono assistance they can scrape together and their own pro se efforts," Freedman, *supra*, at 1090, further raising the specter that serious constitutional claims will never be heard on the merits or that underfunded and inexperienced appointed lawyers or out-of-state *pro bono* counsel may fall into procedural traps for the unwary. *See* Victor E. Flango, *Habeas Corpus in State and Federal Courts* 74 (1994) ("Of the procedural defaults where representation was known, 82 percent of the petitions in state courts and 91 percent of the petitions in federal courts were filed without benefit of counsel.").

Over the past decade, Alabama lawyers reportedly have been loathe to take a death penalty appointment because of the notoriously low pay and lack of funding

to adequately defend the cases.[12] For cost and other reasons, private firms likewise reportedly have been increasingly reluctant to take capital cases on a *pro bono* basis.[13]

Alabama is also one of only four states that allow a trial judge to override a jury's recommended sentence and impose a different one. *See* Ala. Code § 13A-5-47(d)-(e); ABA Report, *supra*, at v, 228. "Further complicating the issue, Alabama is the only state with such override that selects its judges in partisan elections." ABA Report, *supra*, at v; *see also id.* at 226, 228 (providing examples of Alabama judicial candidates touting their law-and-order stance on the death penalty and noting that "a study of judicial override in Alabama found that trial judges use life to death overrides more than twice as often in the twelve months before a judicial election than in the years between elections"). It is thus striking

---

[12] Sara Rimer, *Questions of Death Row Justice for Poor People in Alabama*, N.Y. Times, Mar. 1, 2000 (chronicling the story of an Alabama lawyer who said he would go to jail before accepting another death penalty appointment because the State provides insufficient pay and expenses for experts to properly defend the cases); *accord* ACLU Report, *supra*, at 5-7 (noting low fees and no expenses for appointed lawyers in Alabama and that a large number of Alabama death row inmates lack any counsel).

[13] Crystal Nix Hines, *Lack of Lawyers Blocking Appeals in Capital Cases*, N.Y. Times, July 5, 2001 (reporting that "private law firms are increasingly unwilling to take on burdensome, expensive and emotionally wrenching capital cases" and that "[t]he shortage of counsel to help death row inmates file state appeals and federal habeas corpus petitions . . . places them at risk of missing crucial filing deadlines").

that "90% of overrides in Alabama are used to impose sentences of death." *Id.* at v (noting "[t]here are at least ten cases in Alabama where a judge overrode a jury's unanimous, 12-0 recommendation for a life without parole sentence"); *see also* ACLU Report, *supra*, at 15 (noting modern history of overrides and that in 54 of 57 overrides Alabama judges changed a jury life sentence to a sentence of death). By contrast, "in Delaware, where judges are appointed, overrides are most often used to override recommendations of death sentences in favor of life." ABA Report, *supra*, at v.

"Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III." *Harris v. Alabama*, 513 U.S. 504, 519-20 (1995) (Stevens, J., dissenting) (citations omitted). The risk of that type of political pressure undoubtedly is magnified when the question is whether to allow a defendant already sentenced to death to fall within an exception to a procedural rule that may otherwise completely bar post-conviction review of federal constitutional claims.

C. *Walker* and this Case Provide the Best Context in Which to Balance the Competing State and Federal Interests Over Which Party Bears the Burden of Proving Adequacy

1. In tandem, *Walker* and this case also present complementary contexts for resolving the conflict over which party bears the burden of proving the adequacy or inadequacy of a state procedural bar. Whereas the

Ninth Circuit in *Walker* properly placed the burden of proving that the California rule was adequate on the State, *see Walker* Pet. at 7, the Eleventh Circuit below placed the burden on Maples. *See* Pet. at 19-20.[14]

At its most basic, the question of burden allocation boils down to how much deference federal habeas courts should give states in the adequacy inquiry. In all respects, the Eleventh Circuit below gave Alabama far too much deference. As petitioner notes, the Eleventh Circuit engaged in a "*post hoc* effort to pigeonhole Alabama cases into its own newly-invented tripartite framework" thereby "manufactur[ing] a firmly established and regularly followed default rule." Pet. at 17. Beyond that, the court of appeals went so far as to ignore its own precedent allowing "an equitable exception" to the procedural default here. *See Siebert v. Allen*, 455 F.3d 1269, 1272 (11th Cir. 2006). The court below previously had recognized that a default is excused if "some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003) (quotation source and marks omitted). That was unquestionably the case here where no one disputes that Maples bears no fault for the missed deadline, and the State did nothing when it learned that

---

[14] *Compare Jones v. Sussex I State Prison*, 591 F.3d 707, 716 (4th Cir. 2010) (burden on the state), *with Paredes v. Quarterman*, 574 F.3d 281, 289 (5th Cir. 2009) ("Where a state court asserts a procedural bar, we presume that obstacle is adequate and independent, but the petitioner can overcome that presumption by showing that state courts do not strictly or regularly follow the rule." (quotation source and marks omitted)).

that Maples's *pro bono* lawyers never received the notice that started the clock for his appeal.

In this regard, the divided Eleventh Circuit's deferential lens appears consistent with reports concerning the court's past practice. The Eleventh Circuit in recent years reportedly has denied substantive relief in twenty-two of twenty-four death penalty cases, each time "because many of the constitutional violations raised by condemned prisoners were deemed procedurally barred." Stevenson, *supra*, at 351; *cf. Holland v. Florida*, 130 S. Ct. 2549, 2559-60, 2565 (2010) (rejecting Eleventh Circuit's "overly rigid *per se* approach" to equitable tolling under which attorney gross negligence could never permit equitable tolling to missed deadlines in death penalty cases).

Likewise, even for non-capital cases the Eleventh Circuit's approach to procedural default appears out-of-step with other circuits. Whereas some datasets reflect that non-capital habeas petitioners won on the merits in the Fifth and Sixth Circuits at rates of 21.73% and 22.85%, respectively, the success rate in the Eleventh Circuit was 1.66%. Blume et al., *supra*, at 18-19 n.86.

2. At the other end of the spectrum, in *Walker* the State criticized the Ninth Circuit for giving insufficient deference to California procedural rules, calling the court's approach "an affront to notions of federalism and comity." *Walker* Pet. at 7. To the State there, in all but the rarest cases any adequacy review of state rules is "wasteful and unreliable" and leads to "untenable second-guessing of the state courts on state-law questions." *Id.* at 5, 8.

Together, these cases present the ideal context in which to weigh the critically important question of how much deference is due to a state in the adequacy inquiry. If the Ninth Circuit in *Walker* supposedly "nullified" any state procedural bar from ever precluding federal habeas review, *Walker* Pet. at 7, then the Eleventh Circuit in this case stripped the adequacy requirement of all its force in preventing state discrimination against federal rights.

D. This Case Provides Much Needed Context to *Walker* to Enable the Careful Calibration of the Boundaries of State Case-Law-Based Interpretation of Timeliness Rules

1. Beyond the federalism considerations, granting review of this case would present the Court with a fuller context in which to provide "broad guidance on the adequate state ground doctrine." *Kindler*, 130 S. Ct. at 619. The Court repeatedly has noted the limited contexts of its prior rulings in this area. This case, together with *Walker*, better captures the range of circumstances where the adequacy inquiry is applied.

Walker concerns a judge-made, overtly discretionary habeas corpus timeliness rule. Most states, however, do not appear to employ judge-made, purely discretionary time bar rules; instead, as the State in *Walker* appeared to recognize, Reply to Brief in Opposition at 2-4, Walker v. Martin, No. 09-996 (U.S. May 27, 2010), states often have written rule-based or statutory deadlines that incorporate discretionary exceptions or components.

The Alabama rules at issue here are more akin to the typical timing provisions because they are written, but give room for discretion in the determination of whether a failure to meet the deadline was "without fault." *See* Ala. R. Crim. P. 32.1(f). And while the extent of a court's discretion is not at issue here—since all agree that Maples was "without fault"—this case still presents a complementary context to clarify the adequacy of a written rule that was applied in a capricious manner, which otherwise may elude consideration in *Walker*, as it did in *Kindler*. *See Bostick v. Stevenson*, 589 F.3d 160, 165 n.6 (4th Cir. 2009) ("In *Kindler*, the Court held only that facially discretionary state rules can be adequate to preclude federal habeas review. We do not read *Kindler* to apply to facially mandatory rules that state courts nonetheless apply arbitrarily." (citations omitted)).

Further, in *Walker*, the Ninth Circuit based its inadequacy determination principally on the state courts' lack of case law sufficiently defining the judge-made default rule. 357 F. App'x at 794. This case involves a procedural rule that on its face authorized the out-of-time appeal, but was interpreted by Alabama judges in a manner contrary to its text and prior Alabama state case law. In this regard, this case provides the best vehicle to address concerns raised by Justices of this Court in *Kindler* about the need for further guidance on the level of specificity or consistency that an evolving body of state case law must provide in order to establish an adequate default rule. *Kindler*, 130 S. Ct. at 620 (Kennedy, J., joined by Thomas, J., concurring) (observing that standard relating to the state "case process" and "case law decisional dynamic" should be addressed).

2. The unbalanced framework the State will pursue in *Walker* further reflects why this case would be an apt companion. As reflected in its petition, the State argues that discretionary state procedural rules are effectively *per se* adequate: "This Court's recognition in *Kindler* of the legitimacy of discretion-based rules . . . necessarily leads to the conclusion that federal courts should not second-guess . . . discretionary procedural rulings." *Walker* Reply at 1. Any consideration of such a wholly deferential standard for the adequacy inquiry would benefit from seeing how it would apply in other contexts such as here, a death penalty case where state judges interpreted a procedural bar facially at odds with a written rule's text and prior case law construing the timeliness provision.

* * *

Last term, this Court reiterated that "the writ of habeas corpus plays a vital role in protecting constitutional rights." *Holland*, 130 S. Ct. 2562 (quotation source and marks omitted). "[I]t is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." *Lonchar v. Thomas*, 517 U.S. 314, 330 (1996). That is even more the case when a man's life is at stake. As different sides of the same doctrinal coin, reviewing *Walker* and this case together would provide the complete framework to clarify the standards for the adequacy inquiry. This Court should grant plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LISA S. BLATT
Counsel of Record
ANTHONY J. FRANZE
MICHAEL TYE
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Amicus Curiae